

OFFICIAL OPINION NO. 77-62, The right of legislators to bid on State contracts

July 26, 1977

Mr. J.E. Brinkman, Director  
Purchasing and Printing  
Bureau of Administration  
State Capitol  
Pierre, South Dakota 57501

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**The right of legislators to bid on State contracts**

Dear Mr. Brinkman:

In your request for an official opinion, you have submitted the following information:

FACTS:

The South Dakota Legislature in 1977 amended SDCL 5-23-14 to provide that "a member of the state Legislature" may be awarded a State contract "when such person is the lowest responsible bidder . . . if such contract award is not in violation of the provisions of § 12 of article III of the state Constitution." The South Dakota Constitution under article III, § 12 provides that "no member of the Legislature shall . . . during the term for which he shall have been elected, or within one year thereafter, be interested, directly or indirectly, in any contract with the State or any county thereof, authorized by any law passed during the term for which he shall have been elected."

Based upon the foregoing information, you have asked the following three questions:

QUESTIONS:

1. If a current legislator is low bidder on a State contract and an award or contract were made with him, would this be a violation of § 12, article III of the South Dakota Constitution?

2. Since a legislator is in a position to vote yea or nay, or withhold his vote on the general appropriations bill, does this indicate an interest "directly or indirectly" on contracts let by the State which utilize those appropriated funds?

3. Assuming a legislator is found eligible to bid on and be awarded contracts for supplies, equipment and other commodities, do the provisions of SDCL 5-18 govern as referenced, which relate to "public improvement" (construction), or the provisions of SDCL 5-23?

SDCL 5-23-14 provides as follows:

No contract shall be awarded to any officer or employee of the state, nor shall any pay of any contract be awarded to any firm, association, or corporation, in which any state officer or employee shall be interested, either directly or indirectly, and any contract made in violation of the provisions of this chapter shall be absolutely void; provided, however, that the provisions of this section shall not apply to such notaries public nor to such other state officers or employees serving on boards or commissions, who are not drawing a salary from the state. The provisions of this section shall also not apply to a member of the state Legislature when such person is the lowest responsible bidder in accordance with the provisions of chapter 5- 18 if such contract award is not in violation of the provisions of section 12 of article III of the state Constitution. Any officer or employee of this state who shall willfully and knowingly violate the provisions of this section shall be punishable by a fine of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not less than thirty days nor more than one year.

Article III, § 12 of the South Dakota Constitution provides as follows:

No member of the Legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased during the term for which he was elected, nor shall any member receive any civil appointment from the Governor, the Governor and senate, or from the Legislature during the term for which he shall have been elected, and all such appointments and all votes given for any such members for any such office or appointment shall be void; nor shall any member of the Legislature during the term for which he shall have been elected, or within one year thereafter, be interested, directly or indirectly, in any contract with the state or any county thereof, authorized by any law passed during the term

for which he shall have been elected.

There is a well recognized presumption in the law that acts passed by the Legislature are constitutional, *State ex rel. Oster v. Jorgenson*, 136 N.W.2d 870 (1965) and that no statute should be held unconstitutional unless its infringement of constitutional restrictions is so plain and palpable as to admit of no reasonable doubt. *Clem v. City of Yankton*, 160 N.W.2d 125 (1968).

It is clear that the 1977 Legislature desired to allow legislators to participate in public contracts. It is also clear, however, that the Legislature recognized the limitations imposed by the Constitution. The Constitution then is the key to answering your questions.

IN RE QUESTION NO. 1:

With respect to the first question, the South Dakota Constitution in article III, § 12 explicitly states that no member of the Legislature may be interested either directly or indirectly in any contract with the State authorized by any law passed during his term. This appears to be an absolute prohibition against any such activity by present state legislators during their terms in office or within one year thereafter, if the contract is authorized by any law passed during the legislators' terms. Thus, if a current legislator is low bidder on a state contract authorized by a law passed during his term, and an award or contract were made with him, this would constitute violation of article III, § 12 of the State Constitution.

The question is thus raised as to what is meant by the requirement that the contract be authorized by the Legislature during the legislator's term of office. Is there a sufficient connection to engage the constitutional prohibition if the contract is only to be paid out of funds appropriated by the General Appropriations Act during the legislator's term?

SDCL 4-8-1 requires that an appropriation exist before money be drawn from the public treasury. In my view, the constitutional prohibition against direct or indirect benefits indicates an intended broad scope of prohibition. I do not believe the framers of our Constitution intended article III, § 12 to apply only to obvious cases of clear direct conflict. In my opinion, article III, § 12 imposes a prohibition not only in the case where the Legislature passes a whole new act authorizing the specific project out of which the contract grows and is paid, but also in the case where everyday recurring contracts for state government supplies are bid and paid for out of general appropriated funds.

IN RE QUESTION NO. 2 AND 3:

In view of the foregoing, the second and third questions need not be further answered.

Respectfully submitted,

William J. Janklow  
Attorney General

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