

1973 S.C. Op. Atty. Gen. 362 (S.C.A.G.), 1973 S.C. Op. Atty. Gen. No. 3673, 1973 WL 21124

Office of the Attorney General

State of South Carolina

Opinion No. 3673

December 17, 1973

*1 Mr. Robert L. Hawthorne, Jr.
Attorney at Law
200 E. Pinckney Street
Abbeville, South Carolina 29620

Dear Bob:

Thank you for your letter of December 14 directed to me in your position as Attorney for Abbeville County School District No. 60, and inquiring as follows:

1. May a school trustee contract with the School Board of Trustees, as a general contractor, to construct a school building?

In my opinion, the trustee is clearly prohibited from entering into such a contract by virtue of the provisions of Section 21-961, Code of Laws, 1962. An opinion issued by Judge James Spruill dated October 11, 1969, is included in the Opinions of this Office for the year 1969 and a copy of that opinion is enclosed herewith. You will note that Judge Spruill held the cited statute applicable in analogous circumstances and, additionally, set forth the principle that, irrespective of the statutory prohibition, the contract entered into by a member of a board with the board of which he was a member is contrary to public policy.

You inquire additionally:

2. May a school trustee contract as a subcontractor with a general contractor, which general contractor has contracted with the School Board of Trustees for the construction of a school building?

The answer to this question is uncertain in some respects. If a prearrangement exists whereby the trustee is promised a subcontract prior to the award the contract by the School Board, there is no doubt in my mind that such a direct interest exists as would vitiate the contract. If the subcontract is entered into without prearrangement and without any subterfuge, fraud or collusion, it is my opinion that a school trustee, acting as a subcontractor in such circumstances, is still directly interested in the contract with the School Board. I recognize a reasonable basis for difference of opinion upon this point but I reach this conclusion in the light of the purpose of the statute and the principle of law referred to, which has been adopted in this State as noted in the opinion by Judge Spruill. I reach this conclusion also as the result of the experience of this Office in contractual matters involving the construction of State buildings. In a number of instances we have brought actions against principal contractors because of defects in work alleged by the contractor to have been performed by his subcontractors. Recovery against the price contractor could, in turn, render the subcontractor liable to him, and we have on at least one occasion had subcontractors impleaded by the contractor in such lawsuits. This indicates to me a direct interest which a subcontractor can have in such matters and indicates also the possibility of conflicts of interest arising in the settlement of such disputes. Such confrontations are one of the reasons which the statute and the rule of law cited are designed to prevent and avoid. Consequently, it is my opinion that the school trustee may not contract as a subcontractor with a general contractor who, in turn, has contracted with the School Board for the construction of a building, in that the subcontractor is thereby directly interested in a contract with the School Board of which he is a trustee.

*2 With best wishes,
Very truly yours,

Daniel R. McLeod
Attorney General

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