



THE ATTORNEY GENERAL  
OF TEXAS

AUSTIN, TEXAS 78711

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December 18, 1970

Honorable Bevington Reed  
Coordinating Board  
Texas College and  
University System  
P. O. Box 12788, Capitol Station  
Austin, Texas 78711

Opinion No. M-751

Re: May Odessa College contract with a private corporation, where a member of its Board of Regents is a minority stockholder and President of such corporation, where the benefits derived from such contract are placed in a scholarship fund?

Dear Dr. Reed:

Your request for an opinion presents the following facts:

"In approximately 1952, Del-Tex, Inc. placed vending machines on the campus of Odessa College. These machines were placed there with the permission of the College Administration.

"The College requested, and Del-Tex, Inc. paid, 30% of the gross for cold drinks and 10% of the gross for candy and coffee sold into the General Fund of Odessa College.

"There was no written contract entered into at that time, and there has been no subsequent written contract entered into.

"In the early 1960's, Del-Tex, Inc. no longer operated the vending machines, but the operation of Del-Tex was taken over by West Texas Vending, Inc., which is partly owned by Del-Tex, Inc.

"In 1960, the Board of Regents of Odessa College directed

the Business Manager of the College to deposit all sums received from the vending company into the Odessa College General Scholarship Fund rather than depositing it into the General Fund of the College. The administration of the College awards scholarship funds to worthy students from the proceeds it receives from the vending machine company.

"In 1967, the President of Del-Tex, Inc., who owns no stock in Del-Tex, and receives no bonus from any sales made by Del-Tex, became a member of the Board of Regents. This same regent is President of West Texas Vending, Inc., and owns about 20% of the stock.

"There are at this time three other vending machine companies which have vending machines on the campus of Odessa College. The companies owning the vending machines pay a percentage of their gross receipts into the same scholarship fund. None of the vending machine companies have written contracts, and it is the understanding between all of the vending machine companies and the College that they can be asked to take their machines from the campus at any time, or they may voluntarily take the machines from the campus at any time.

"There is no restriction on the number of vending machine companies which are allowed to have machines on the campus. Any vending machine company can place machines on the campus merely by obtaining permission of the administration. It would be expected, however, that any vending machine company desiring to place vending machines on the campus would be required to pay a percentage of the proceeds into the Scholarship Fund."

From the above stated set of facts we must determine if this is a contract entered into by Odessa Junior College, acting by and through its

Board of Regents and West Texas Vending Machine Company; and if so, would such contract be in violation of the public policy by reason of a member of the Board of Regents being a minority stockholder (20%) and President of West Texas Vending Machine Company.

Even though the proceeds derived from the vending machines are used for a worthy purpose (Scholarship Fund), the Board of Regents has control of such funds as indicated in the facts submitted.

It appears from the facts submitted that there is an express oral contract between Odessa College and West Texas Vending Machine Company in view of the fact that the college has authorized the vending machine companies to place their vending machines in the college buildings or on campus, for which locations the college receives 30% of the gross on cold drinks and 10% of the gross on candy and coffee from the vending machine companies.

Black Law Dictionary, 4th Edition, defines an express contract as follows:

"An express contract is an actual agreement of the parties, the terms of which are openly uttered in distinct and explicit language, either orally or in writing. 2 Bl. Comm. 443 and other authorities cited."

From the cases cited, it is clear that a member of the Board of Regents is a public official. In the case of Schurz v. Telfer, 74 S. W. 2d 327 (Tex. Civ. App. 1934, no writ) the Court held that a school trustee of a county common school district was a county officer. Also see Buchanan v. Graham, 81 S. W. 1237, 1239, (Ct. of App. 1904).

The Legislature has not defined conflict of interest in the context of the facts presented. However, in Attorney General's Opinion No. O-1589 (1939) this office held:

"It is well settled in Texas that if a public official directly or indirectly has a pecuniary interest in a contract, no matter how honest he may be, and although he may not be influenced by the interest, such

contract is against public policy. Myers, et al v. Walker, et al, 276 S. W. 305. Also, see Attorney General's Opinion No. O-878 (1939)."

These authorities are determinative of our answer. This office has heretofore so considered this principle of law in Attorney General Opinion No. M-625 (1970). See also 43 Am. Jur. 107, Public Officers, Sec. 300, and cases cited. Until the Legislature sees fit to modify this common law principle, which Texas has adopted, a court is without authority to uphold the contract before us.

SUMMARY

Odessa College cannot lawfully enter into a contract with a vending machine company where a member of its Board of Regents is the President and a stockholder of the vending machine company, since this would be in violation of the public policy of the State of Texas forbidding public officials who have a pecuniary interest in a contract from contracting with entities in which they have a pecuniary interest.

Yours very truly,

  
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