

ELECTION BOARD: Contract made by old Board for printing is binding
on new Board.

February 4, 1938

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Mr. J.E. Woodmansee, Chairman
Board of Election Commissioners
Kansas City, Missouri

Dear Sir:

This department is in receipt of your request
for an opinion which reads as follows:

"The Board of Election Commis-
sioners of Kansas City desires your
opinion upon the following question:

"On April 23, 1937 the then exist-
ing Board of Election Commissioners
of Kansas City signed an alleged con-
tract with the Vile-Goller Printing
Company for the printing of the
printed list of voters and supplemental
lists to be prepared and distributed
for the city election 1938 and certain
subsequent elections. The contract is
dated April 23, 1937 but is effective
as of April 1, 1937. A copy of this
contract is marked 'Exhibit A' and at-
tached hereto.

"The price stated in that contract is
5½¢ per name. Mr. Shapiro, who repre-
sents the Vile-Goller Printing Company,
states that this price was quoted be-
cause at that time the CIO was causing
the printers some trouble and since
that trouble has now been cleared up
the printing company will reduce this
price to 4.95¢ per name.

"Our search discloses that no minute
was made by the old board of any action
at all upon such contract.

"At the time this contract was entered into the Legislature at Jefferson City was considering a bill for permanent registration. This bill was later passed and was approved by the Governor under date of June 30, 1937.

"Under the law existing April 23, 1937 the terms of the Board of Election Commissioners for Kansas City acting at that time had expired but their successors had not been duly appointed and qualified.

"All these facts were at the time of signing the contract well known to the Vile-Goller Printing Company and its representatives.

"At an executive Board meeting held last Saturday it was shown, and it appears, that on the strength of this contract the printing company purchased ten tons of linotype metal. They have done previous work for the Board. In the fulfillment of previous contracts they used rented linotype machines. On the strength of this contract so entered into, they have purchased some machines, and are fully equipped and capable of readily performing this contract.

"The Board desires your legal opinion whether this alleged contract entered into at that time is valid and binding as against this board, under the Permanent Registration Act applicable to Kansas City, Missouri, approved June 30, 1937, Laws of Missouri 1937, page 294 ff."

This contract was entered into on April 23, 1937, by the then existing Board of Election Commissioners of Kansas City. Although the office of election commissioner had expired January 15, 1937, still the commissioners were holding over until their successors were appointed and qualified. (Section 10567, R.S. Missouri, 1929) This board was operating under authority of Chapter 61, Article 17 of the Revised Statutes of Missouri, 1929, and it was not until June 30, 1937, that the law repealing Chapter 61, Article 17 was passed and approved by the Governor. It will, therefore, be seen that the legality of the action by the board must be determined under the laws then in effect, i.e. Chapter 61, Article 17, R.S. Missouri, 1929.

As was said in 59 C.J. 170, "A contract made by state officers under statutory authority binds the state notwithstanding the subsequent repeal of the statute authorizing it".

Section 10567 provides in part as follows:

"Said four election commissioners shall hold their office until January 15, 1935, and until their successors are appointed and qualified. Successors shall be appointed in like manner for terms of four years, and until their successors are commissioned and qualified."

Section 10570, R.S. Missouri, 1929, provides as follows:

"Such board shall provide all necessary ballot boxes and all registry books, poll books, tally sheets, ballots, blanks and stationery of every description, with printed headings and certificates, and other equipment necessary and proper for the registry of voters and the conduct of such elections, and for every incidental purpose connected therewith. (Laws 1921, p. 330, para. 6)"

Boards have two classifications of powers -- governmental or legislative, and proprietary or business. In the exercise of governmental or legislative powers, a board in the absence of statutory provision, cannot make contract

extending beyond its own term. But in the exercising of business or proprietary power, a board may contract as any individual unless restricted by statutory provision to the contrary. Illinois Trust and Savings Bank v. Arkansas City, 76 Fed. 271; Omaha Water Co. v. Omaha, 147 Fed. 1 (Appeal dismissed 270 U.S. 584); Indianapolis v. Indianapolis Gas, Light and Coke Co., 66 Ind. 396; Valparaiso v. Gardner, 97 Ind. 1; First National Bank v. Emmetsburg, 157 Iowa 55; Westminster Water Co. v. Westminster, 98 Ind. 551; Kerlin Bros. Co. v. Toledo, 20 Ohio C.C. 603; Jacobberger v. School District, 122 Or. 124; McCormick v. Hanover Twp., 246 Pa. 169.

As was said in Omaha Water Co. v. Omaha, supra, through Circuit Judge Sandborn:

"A city has two classes of powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public and they may make no grant or contract which will bind the municipality beyond the terms of their offices because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances."

Therefore, it becomes important to ascertain the power to be exercised by a board to determine the binding effect of a contract. 70 A.L.R. 795.

The contract binding a board for printing falls within the category of the business power of the board and

as such, the board may contract as any individual since there is no statutory provision to the contrary. The classification of this function of the board is especially pointed out in order to differentiate the situation here from that which existed in *Tate v. School District*, 23 S.W. 2nd 1013, and *Aslin v. Stoddard County*, 106 S.W. 2nd 472. These cases hold that if the board is a continuing body - that is, if all the members do not go out of office at the same time, but at different times - then such board may contract beyond the term of some of its members, but if all go out together, they cannot contract beyond their term. Those cases involve contracts for personal services and they fall within the classification of governmental or legislative power.

In the case of *Liggett v. Kiowa County* (1895) 6 Colo. App. 269, 40 Pac. 475, it appeared that a board of county commissioners contracted for the county printing with the plaintiff for a year, that a majority of the board went out of office a few days later, and that the new board, holding the contract to be a nullity, let the printing go to another person. In an action for breach of the contract with the plaintiff, the court said:

"The board was in office; it had full authority to act with reference to all matters which legitimately came before it at that time; and, in the absence of any proof showing fraud and collusion, or that the agreement must of necessity be so vitally injurious to the public's interests as to render the agreement void as against public policy, the contract cannot be adjudged invalid because it was to be completed after the term of the majority of the board as it then existed should have expired."

In *Picket Publishing Co. v. Carbon County*, 36 Mont. 88, 92 Pac. 524, the board of county commissioners were authorized to contract for the county printing. A contract was made for such printing which would extend beyond the term of office of some of the members of the board. The Supreme Court of Montana held that the contract was binding in absence of fraud in its making, unless the contract was void as against public policy. The court said:

"The power to make the contract is specifically granted; but the time when such power shall be exercised is not limited or prescribed. Therefore we say that the proposition is incontrovertible that it may be exercised at any time during the term of the board, when a prior contract of such work has expired or is about to expire, and, so far as the power of the board is concerned, it is just as ample and complete the last week of the board's official existence as at any time prior thereto. The making of such a contract at a time near the close of the official career of an outgoing board may, in some instances, savor of bad faith or even of fraud; but there is not any charge of bad faith or fraud in this instance. The board having the power to make a printing contract any time during its term
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 it was valid and binding upon the new board as upon the old one (Board of Commissioners of Jay County v. Taylor, above), in the absence of fraud in its making, unless the contract is void as against public policy."

In the instant case we presume that the price was fair and the contract was entered into without fraud or collusion. The Supreme Court of Missouri in *Aslin v. Stoddard County* at 106 S.W. 2nd 472 said: "Fraud is not presumed. Contra, right rather than wrong action is presumed, if presumption may be indulged in. So far as concerns plaintiff alone, that contract certainly cannot be said to indicate bad faith on the part of the court".

As to whether the duration of the contract represents an unreasonable time as would avoid the contract seems to be entirely a question of fact and we cannot say as a matter of law that such a time is unreasonable.

The second question presented is whether the failure of the board to enter the contract in the minutes would invalidate or nullify the contract. It seems to be the rule in relation to boards that where the mode and manner of contracting is not prescribed, nor the persons or agents by

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and with whom contracts are to be made, the boards may make contracts in all matters necessarily pertaining to them in the same manner as individuals. 15 C.J. 552; 59 C.J. 175. Therefore, the failure to record the contract in the minutes of the board would not invalidate the contract, since there is written contract in existence signed by the parties.

CONCLUSION

It is, therefore, the opinion of this department that boards may, in exercising their business or proprietary power, make contracts extending beyond the terms of its members. In the absence of any showing of fraud and collusion, such a contract is a valid one and binds the subsequent board. The failure of the board to enter such contract in its minutes does not in any way vitiate the contract because a board in exercising the business power may contract as an individual.

Respectfully submitted,

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APPROVED By:

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