

N.D.A.G. Letter to Wild (June 4, 1985)

June 4, 1985

Mr. Steven J. Wild
Bowman County State's Attorney
Assistant City Attorney
P. O. Box 177
Bowman, North Dakota 58623

Dear Mr. Wild:

Thank you for your letter of May 21, 1985, inquiring as to the prohibition of N.D.C.C. § 48-02-12 to a situation where a mayor, who was interested personally in a public contract, has resigned so as to continue pursuing his interests in the contract involving the city of Bowman. You inquire as to whether his resignation would act to allow him to continue his involvement in this contract with the city. You further ask as to the duration of the resignation.

The statute in question prohibits governing boards and members thereof from becoming personally interested or concerned directly or indirectly in any public contract that might be entered into by any board or member thereof. Thus, in a situation where a person was a member of such a governing board, but took steps to remove himself from the board prior to the entering into of the contract in question, this statute would not be applicable. In such a case, the former member of the city governing body would be free to pursue his personal contractual interests involving the city.

Your further question suggests an arrangement may be had whereby a member may temporarily discontinue his membership on the governing body so as to avoid the consequences of this statute. Actually, the statute does not speak to this situation. Furthermore, it would appear that such an arrangement may constitute a sham so as to perform an "end run" around the statute in question. Where so perceived, a court may have little problem in ignoring whatever contrived arrangement may be made. We would urge caution in any attempt to arrange a protective shelter from the application of the statute.

Suffice it to state that at the time the public body enters into the contract, no member of the governing body shall be personally interested, directly or indirectly, in that contract. Where a person was a former member of the body, but is no longer such a member at the time of their entering into of the contract, this prohibition would not apply.

I can fully appreciate the hardship caused by the application of this statute upon a person in your situation. The hardship is worsened in those cases where the city official also is the lowest and best bidder. Unfortunately, the Legislature has not provided exceptions to

this particular prohibition. Although I understand this problem and may not agree with the result, I am not free to ignore the statutory language employed by the Legislature.

Sincerely,

Nicholas J. Spaeth

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