

July 30, 1937.

Hon. W. A. Brown
State Examiner
The Capitol

Dear Mr. Brown:

You have submitted the following:

"To enable this department to properly criticize the legality of proceeding relative to certain contracts and also payment of certain warrants which are hereinafter more fully set out, we would like to have your opinion relative thereto.

"The contracts referred to are in connection with the water tank and connection of the new wells. The first of these contracts was let at a special meeting, all members of the Council being present. The contract called for an expenditure of \$3,185.00 and was let under the referred authority of Section 5060 R. C. M. 1935. There was also a contract let with the same contractor, W. A. Davis, for the inspection and repair of the tank over a period of **twenty years** at a fixed price of \$150.00 per year. (These contracts were let July 10, 1936.)

"Another special meeting was held July 15, 1936, the minutes showing that Alderman Berger was absent and at this meeting another contract was let to Mr. Davis to connect the new well with the city mains, move the pump house and other matters, for the sum of \$2,000.00.

"On July 16, 1936, at a regular meeting the Council approved and paid to Mr. Davis the sum of \$1,000.00 on the first mentioned contract and the sum of \$500.00 on the second mentioned contract.

"At another special meeting held July 22, 1936, Councilman Berger was absent. The minutes of this said meeting and the special meeting of July 15, 1936, do not show that they were properly called or that Mr. Berger had been notified. At this meeting the Council approved twenty claims for Mr. Davis against the Town for \$100.00 each, claims dated July 22, 1936, the first one payable August 9, 1936, and one each month thereafter. At the same time approval was made of thirty claims against the Town for \$50.00 each, the first being payable August 14, 1936, and one each month thereafter. At this meeting on July 22nd the Council also

Opinion No. 130.

Cities and Towns—Contracts—Emergency—Public Officers—Purchase of Warrants.

HELD: The question of existence of an emergency to justify the making of a contract by a city council without calling for competitive bids is one of fact upon which we cannot express an opinion.

Where resolution or measure passed by city council merely recited that an emergency existed, it is a conclusion and does not substantially comply with the requirements of Section 5060.

A contract extending over a period of twenty years for repair of water plant made by city council is in violation of Section 5070 and is void and payment of warrants on said contract should not be made by the city treasurer.

Contract for an even sum of \$500 for a road grader made by town council does not violate Section 5070.

The purchase of city warrants by a bank, the vice-president of which is the mayor of the town issuing the warrants, does not constitute a violation of Sections 5069 or 447 R. C. M. 1935.

entered into a contract to purchase a road grader from the City of Great Falls for \$500.00, with a down payment of \$200.00, the remainder payable annually in installments of \$100.00 each. * * *

"There were no advertisements for bids or other steps taken to insure the taxpayers of the Town that they would receive the benefit of competitive bidding.

"By reason of the above facts relating to the contracts, will you please render an opinion whether or not the Davis contracts and contracts for tractor are legal, and if not legal, should they be treated as void contracts and the Treasurer of the Town instructed to refuse to pay any of the warrants issued for any or all of the above said contracts?

"It was noticed that beginning with August, 1936, the claims on the Davis contracts, approved as above stated, have been regularly paid in the amount of \$150.00, plus interest, to the First National Bank of Browning, which bank appears from the claims to be the assignee of such claims. * * *

"By reason of the fact that Mr. J. L. Sherburne was the mayor at the time of letting of the above said contracts and during the time of the payment of the warrants of Mr. Davis, and assigned to the First National Bank of Browning, and he is still the Mayor of said town and also was and is the Vice-President of the First National Bank of Browning, would Mayor Sherburne be violating Section 447 R. C. M. 1935 or any other laws of the State of Montana?

"In further reference to what seems irregularities, will advise that General Fund Warrant No. 383 for \$1,200.00 issued to United States Rubber Company on January 23, 1922, was paid to the First National Bank of Browning in the amount of \$1,500.00, the sum of \$300.00 being for interest, this payment being evidenced by Treasurer's Check No. 72, issued March 31, 1932. We were furnished a letter written by Irwin, O'Connell and Zarlengo, Attorneys at Law, Denver, Colorado, advising that they were informed by their client Union Mutual Investment Company that it was the holder of a Town of Browning, Montana, warrant, in the amount of

\$1,200.00; that about the year 1932 it sold or turned over to a banker at Browning, Montana, the above warrant and received from him the par value of the warrant, or \$1,200.00.

"By reason of Mr. J. L. Sherburne being a Councilman of the Town of Browning, and also Vice-President of the First National Bank of Browning, would Mr. Sherburne be violating any law or laws of the State of Montana?"

1. The first question presented is whether the contract made by the town council with Mr. Davis, to put the water plant in first-class condition is legal.

Section 5060 R. C. M. 1935 permits the passage of emergency measures or resolutions upon a two-thirds vote, provided such measures are immediately necessary for the preservation of peace, health and safety. In other cases, no ordinance or resolution shall be effective until thirty days after its passage. Section 5070 R. C. M. 1935 provides:

"All contracts for work, or for supplies or material, for which must be paid a sum exceeding five hundred dollars (\$500.00), must be let to the lowest responsible bidder, under such regulations as the council may prescribe; provided, that no contract shall be let extending over a period of three years, or more, without first submitting the question to a vote of the resident taxpayers of said city or town."

From the facts submitted we have no way of knowing whether such an emergency existed as would prevent the letting of the contract to put the water plant in first-class operating condition to the lowest responsible bidder or would prevent an opportunity for competitive bidding. The minutes for the July 10, 1936, meeting recite:

"The Town Council met on the above date in special session called by Mayor Sherburne for the purpose of discussing the question of repairs to the water stand pipe and tank to stop a bad leak of long standing. * * *

"After due consideration of the matter by the Council it was moved and seconded * * * that an emergency existed and according to Sec. 5060

Revised Statutes of 1935, and by authority of such Section 5060, emergency contract was let, and that the Mayor and Clerk be authorized to enter into contract with the said W. A. Davis to do all things necessary to put the plant in first class condition, all such necessary things being specified in the contract at a total cost of \$3,185.00. * * *

If there was a bad leak of long standing, it would seem that here would have been no necessity for such immediate action as would prevent competitive bidding between responsible bidders. We have no means of knowing the urgency of the situation, whether there were other bids received or whether an equal opportunity was or was not given other contractors to bid upon the work. We do not therefore express an opinion on the question of emergency. No facts from which the public could judge that an emergency existed are recited in the minutes. The only recital therein is a bare conclusion. We do not think that the recital of such a bare conclusion of an emergency is a substantial compliance with the provisions of said Section 5060.

2. As for the twenty year maintenance contract, it appears to be in violation of the proviso contained in said Section 5070 above quoted, which forbids the making of a contract extending over a period of three years or more, without first submitting the question to a vote of the resident taxpayers. Contracts made in violation of the statute are void. (Section 7553 R. C. M. 1935; 13 C. J. 420, Section 351.) See also analogous cases cited in the following opinions of the Attorney General: Opinion No. 133, Volume 15, Opinions of the Attorney General, page 101; Opinion No. 183 Id., p. 131; Opinion No. 166, Volume 15, Opinions of the Attorney General, page 169. The treasurer of the town should be instructed not to pay warrants issued on a void contract.

3. In regard to the contract to connect the new well with the city mains, it is also difficult for us to see how there could be an emergency warranting immediate action, without asking for bids from competitive, responsible bidders. Surely the council must have known, while the well was being constructed, that it would be necessary to connect it with the city mains in order

to obtain any use from it but inasmuch as the existence of emergency is a question of fact, we are unwilling to express a definite opinion on the facts stated in the minutes of the meeting. If, in fact, no emergency existed, the mere recital in the minutes of a conclusion that an emergency existed, did not create one nor does such recital, as we have pointed out heretofore, substantially comply with the requirements of the statute.

4. Since the cost of the road grader did not exceed \$500, the contract for its purchase is not affected by Section 5070.

5. You have called attention to the purchase by the First National Bank of certain warrants of the town, and have raised the question whether such purchases were not a violation of the law by the mayor, who was also the vice-president of the bank. Such purchase did not constitute a contract with the town and hence Section 5069 R. C. M. 1935 does not apply and there was no violation thereof. Section 447 R. C. M. 1935 forbids an officer from purchasing city warrants but since the purchase was made by the bank and not by the mayor it is my opinion that Section 477 does not apply. This section does not use the words "directly or indirectly" as does Section 5069, and, therefore, does not prevent a stockholder or an officer of a corporation from indirectly profiting from the purchase of warrants. The violation of Section 447 subjects an officer to criminal prosecution. (Section 10827 R. C. M. 1935.) Since there is no evidence that the mayor himself made the purchase, in my opinion a criminal prosecution against him would not be successful.

The letter of Irwin, O'Connell & Zarlengo, Attorneys at Law, Denver, Colorado, dated November 20, 1936, copy of which you have attached, recites that their client, the Union Mutual Investment Company, was the holder of a warrant in the amount of \$1200, issued to the United States Rubber Company, and that about the year 1932, it sold or turned over to a banker at Browning, Montana, the above warrant and received from him the par value of the warrant, or \$1200. The letter further recites that there was accumulated interest on this warrant for about ten years, amounting to \$600 or \$700, and that client was

obliged to waive this accumulated interest and receive only par for this warrant. It appears from the check issued to the First National Bank of Browning, by the town of Browning, that the said bank received in payment of said warrant on March 31, 1932, the sum of \$1500. Apparently this was about the same time that the warrant was sold to the "banker" at Browning, according to the letter herein referred to. As mayor of the town, the vice-president of the bank should have known the financial condition of the city and possibly he should have informed the person from whom he purchased the warrant, or the person from whom the bank purchased the warrant, if he knew of the transaction, that the city was able to pay interest on said warrant.

We do not know enough of the facts to be able to say whether or not there was any fraud or anything improper connected with this transaction. At any rate, it is a civil matter with which we are not concerned.