1804

1. FEES — NO LEGALLY ESTABLISHED SCHEDULE OF STANDARD FEES GOVERNING MAXIMUM AMOUNT MUNICIPALITY MAY PAY ENGINEERING FIRM FOR SERVICES WHEN COMPENSATION BASED ON FIXED PERCENTAGE OF TOTAL COST OF CONSTRUCTION.

2. WHEN FIRM CONTRACTS IN OWN NAME WITH MUNICIPALITY FOR ENGINEERING SERVICES, NEITHER THE FIRM NOR INDIVIDUAL MEMBERS BECOME PUBLIC OFFICERS.

3. CONTRACT—ENGINEERING FIRM AND MUNICIPALITY —AGAINST PUBLIC POLICY WHEN FIRM REQUIRED TO CERTIFY MATERIALS FURNISHED BY MEMBER OF FIRM ARE OF REQUIRED QUALITY AND QUANTITY.

SYLLABUS:

1. There is no legally established schedule of standard fees governing the maximum amount a municipality may pay an engineering firm for services when compensation is based on a fixed percentage of the total cost of construction.

2. When an engineering firm contracts in its own name with a municipality to render engineering services, neither the firm nor its individual members become public officers.

3. A contract between a firm of engineers and a municipality is against public policy when it requires the firm to certify that materials furnished by a member of that firm are of the required quality and quantity.

Columbus, Ohio, May 25, 1950

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Dear Sirs:

Your request for my opinion reads as follows:

"The current examination of the City of Coshocton, has disclosed the following facts with reference to the employment of an engineer by the city to prepare plans, specifications, etc., for city street and sewer projects; also to furnish the supervision and inspection on such improvement projects:

"Such contracts were made with the Coshocton Engineering Company and provide for a basic fee equal to 10% of the actual

cost of construction of such project. Three of the construction projects in question were awarded to Mr. G. A. S., a partner in the Coshocton Engineering firm, after due authorization of council, advertisement of notice to bidders and in full compliance with the provisions of Section 4328, G. C.

"Enclosed herewith is a copy of the letter received from Mr. W. A. G., State Examiner in charge of said examination, setting forth pertinent facts in connection with such employment; copies of the legislation authorizing employment of the Coshocton Engineering Company and the contract executed pursuant thereto can be furnished for your consideration and information if deemed necessary.

"* * * It was noted that the fees fixed in said engineering contracts, in the amount of 10% appear to be in excess of those usually charged for similar services.

"Since the legality of certain payments made to the Coshocton Engineering Company and Mr. G. A. S. must be determined before our examiner can complete the examination of the City of Coshocton, now in progress, we are submitting the following questions for your consideration and respectfully request that you give us your formal opinion in answer thereto:

"1. When a firm of engineers is employed by a municipality and compensation is provided for such services on the basis of a certain fixed percentage of the total cost of construction, is there any established schedule of standard fees governing the maximum compensation that may be charged and collected for such engineering services rendered in connection with street and sewer projects?

"2. Does the above outlined procedure, by which such engineering firm was hired by contract, make their services strictly one of contractual nature, or does said firm fall under the classification of a public officer; thus making the firm, or any member of the firm, ineligible under Section 3808, General Code, to be interested in any expenditure of money on the part of the City of Coshocton other than compensation as originally fixed by terms of contract for said engineering services?

"3. Can a partner in the firm of engineers employed by a municipality legally contract with such municipal corporation to furnish the material and labor necessary to construct certain street and sewer improvements in accordance with the plans, specifications, and profiles prepared by and under the supervision and inspection of his own firm of engineers?"

I have been unable to find any law which would prohibit contracts from being let out on a fixed percentage of the total cost basis. In 1928 Opinions of the Attorney General, Opinion No. 1896, branch one of the syllabus provides as follows:

> "The council of a village has, unless limited by charter, authority to enter into a contract with a firm of engineers for the performance of engineering services in connection with local improvements, compensation therefor to be made upon a percentage basis of the cost of the improvement."

See also Opinion No. 501, Opinions of the Attorney General for 1929. It can be seen from this that such contracts have been allowed in the past. It would appear that the amount of compensation to be paid for engineering services would be within the discretion of the body empowered to contract for such services. It should be noted, however, that the fees charged should bear a reasonable relation to the work performed. I would like to call your attention further to a pamphlet issued by the Ohio Society of Professional Engineers which is entitled Code of Professional Practice. This pamphlet suggests the minimum fees that engineers should charge in Ohio.

In Opinion No. 258, Opinions of the Attorney General for 1929, branch two of the syllabus reads in part as follows:

> "A firm of engineers may not be employed in such a manner that the individual members of the firm will be regarded as village officers. Section 4364 contemplates the employment of but one engineer as an official and it follows that a number of engineers could not be employed under the provisions of the section. * * *"

It goes without saying that the whole theory of a public office contemplates that only individuals may hold a public office. I do not believe a firm could become a public officer. Further, I do not believe that any one member of a firm which contracts in its own name with a municipality could be made a public officer by reason of such contract. Of course, if an individual contracted with a municipality it would be possible that he would become a public officer. It would depend upon the nature of the contract whether or not he became such. In the case of Wright v. Clark, et al., 119 O. S. 462, an individual was employed to perform engineering services for a village. The resolution of the village council expressly provided that he be employed as "engineer for said village." The court

held that he was an officer and based its decision on the wording of the resolution. See also Opinion No. 258, Opinions of the Attorney General for 1929. Thus, assuming that the contract in question was between the municipality and the engineering firm, as such, neither the firm nor the officers would become public officers of the municipality.

Your request states that a firm of engineers has contracted with the municipality to make plans and to supervise and inspect construction of street improvements. Further, a member of that firm has contracted with the municipality to furnish labor and material for the same improvements. Under this contract, the firm would have to certify that the material used was of the required quality and quantity. That is, the firm would necessarily have to check upon the material furnished by a member of that firm. It is apparent that such a situation would be questionable and would be open to fraud. The judgment and discretion of the supervising firm would be subject to powerful inducements to disregard its duties to the municipality. 9 O. Jur. 348, Section 132, states in part as follows:

> "Public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. To be against public policy a contract must contravene public right or the public welfare. It must be shown to have mischievous tendency as regards the public. And this should clearly appear. A contract will not be held to be void as against public policy unless the public injury is clear; it is not sufficient that the public injury be a matter of opinion. It is clear that the thing that vitiates a contract under a principle of the law which we call 'public policy,' is not an intent to injure the public, but a tendency to the prejudice of the public. Actual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations.
>
> "It has been said that any contract in contravention of statute would be against public policy. But many things not forbidden by express legislative enactment are against public policy and the courts have repeatedly set aside contracts which they had determined to be against good government and the spirit of our institutions. * * *"

In the case of Thomas v. Matthews, 94 O. S. 32, a comparable situation arose. The director of a corporation entered into a contract which limited his use of discretion in the operation of the business. Branch four of the syllabus states:

> "4. A contract made by a director of a corporation that limits or restricts him in the free exercise of his judgment or discretion, or that places him under direct and powerful inducements to disregard his duties to the corporation, its creditors and other stockholders in the management of corporate affairs, is against public policy and void."

I believe this principle of law is applicable to the instant case. That is, the contract of the firm is against public policy in that the firm is required to pass judgment on the quality of material which is furnished by one of its own members.

In conclusion, therefore, it is my opinion that a contract between a firm of engineers and a municipality is against public policy when it requires the firm to certify that material furnished by a member of that firm is of the required quality and quantity.

Respectfully,

HERBERT S. DUFFY,
Attorney General.