



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

May 11, 1995

Honorable Judith Zaffirini
Chair
Health and Human Services Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711-2068

Letter Opinion No. 95-033

Re: Whether article III, section 18 of the Texas Constitution prohibits the granting of an option to purchase and subsequent sale of a tract of land by a corporation, the stock of which is owned by the spouse of a legislator, to an optionee/purchaser who intends to submit a bid to the state to construct improvements on the tract and lease them to the state (ID# 33425)

Dear Senator Zaffirini:

You ask whether article III, section 18 of the Texas Constitution prohibits the granting of an option to purchase and subsequent sale of a tract of land by a corporation, the stock of which is owned by the spouse of a legislator, to an optionee/purchaser who intends to submit a bid to the state to construct improvements on the tract and lease them to the state. You provide the following facts:

The stock of the corporation granting the option is owned by the spouse of a legislator as community property. Neither the corporation, legislator, nor the spouse has any interest in the optionee/purchaser nor is in partnership of any type with it. Neither the corporation, legislator, nor the spouse has any control over the form or amount of the bid to be submitted to the state by the optionee/purchaser or anyone else.

After the corporation grants the option it will be bound to sell at the stated price and at the option of the optionee/purchaser. The option must be exercised within 30 days. If it is exercised, the corporation will sell the land within 30 days and neither the corporation, the legislator, nor the spouse will have or retain any interest in the land and improvements to the state. The optionee/purchaser has no existing lease or agreement to lease the subject tract with the state.

We assume that the sale will be complete and that the corporation will have ceased to have any interest in the tract before the optionee/purchaser submits a bid and/or enters into a contract with the state.

Article III, section 18 of the Texas Constitution provides in pertinent part:

nor shall any member of the Legislature be interested, either directly or indirectly, in any contract with the State, or any county thereof, authorized by any law passed during the term for which he was elected.

Tex. Const. art. III, § 18. *See Damon v. Cornett*, 781 S.W.2d 597, 599 (Tex. 1989) (“member of the Legislature” includes only persons currently serving in the legislature); *Washington v. Walker County*, 708 S.W.2d 493 (Tex. App.--Houston [1st Dist.] 1986, writ ref’d n.r.e.) (court appointment to represent an indigent defendant is not a contract within article III, section 18).

This provision of article III, section 18 was adopted in an effort to prevent improper financial gain by members of the legislature. *See Damon*, 781 S.W.2d at 600. It bars a member of the legislature from being interested in a contract with the state if it is authorized by a statute or funded by an appropriation adopted during his or her legislative term. *See Attorney General Opinions JM-162 (1984), H-696 (1975), M-625 (1970), O-6582 (1945), O-1519 (1939)* (appropriations act will operate as authorizing legislation within article III, section 18). Contracts entered into in violation of this provision are void. *Lillard v. Freestone County*, 57 S.W. 338, 340 (Tex. Civ. App. 1900, no writ); Attorney General Opinion JM-162 (1984).

Your question requires us to address the role of community property laws in determining whether the legislator has a prohibited interest in such a contract. Community property is property owned in common by husband and wife. *Coleman v. Coleman*, 293 S.W. 695 (Tex. Civ. App.--San Antonio 1927, writ ref’d); Fam. Code §§ 5.01, .22. The earnings of each spouse during marriage are community property,¹ subject to sole management, control, and disposition, unless they are mixed or combined with the other spouse’s earnings. Fam. Code §§ 5.01, .22. In the latter case, they are subject to joint management, control, and disposition. *Id.* § 5.22.

Prior opinions of this office, as well as judicial decisions in other states, have concluded that a public officer’s community interest in his or her spouse’s income or property would invoke the common-law rule that prohibits public officers from being personally interested in contracts they enter into on behalf of the government. *See, e.g., Beakley v. City of Bremerton*, 105 P.2d 40 (Wash. 1940) (city attorney who hired his wife as a stenographer had an “interest” in her salary from the city); Attorney General Opinion JM-817 (1987) (university regent’s two percent interest in close corporation and her community interest in husband’s salary and income from corporation are pecuniary

¹Article XVI, section 15 of the Texas Constitution, which defines the basic elements of Texas marital property, permits persons about to marry and spouses to agree that community property will be separate property. Sections 5.41 through 5.56 of the Family Code implement the constitutional provision. Apparently, there is no such agreement in the case before us.

interests in the firm under the strict common-law rule); Attorney General Opinion WW-1406 (1962) (county commissioner was "interested" in his wife's contract to sell her separate real estate to the county, since the revenues were community property).

Thus, under the common-law rule prohibiting a public officer from having a personal pecuniary interest in contracts with the governmental entity that he or she serves, an officer's community interest in his or her spouse's income and property will give the officer an interest in his or her spouse's contracts with that governmental entity.² The contract provision of article III, section 18 is sufficiently similar to the common-law rule that a legislator's community property interests in his or her spouse's income or property should also be treated as the legislator's interest under that provision.

In the present case, the legislator has at least an ownership interest in the spouse's stock and therefore would have an interest in any contract entered into by the corporation. Since neither the legislator, the spouse, nor the corporation is a party to any existing or contemplated contract with the state with respect to the tract, the legislator is not directly interested in any such contract. *See* Attorney General Opinions JM-817, JM-782 (1987) (discussing direct and indirect interests). Thus, the relevant question is whether the corporation (and thus by implication the legislator), by entering into the option to purchase/sale with the optionee/purchaser, has an indirect interest in any contract the optionee/purchaser might enter into with the state.³

Under the facts set forth above, the corporation itself will have absolutely no interest, direct or indirect, in any contract between the state and the optionee/purchaser. The corporation does not have any interest in the optionee/purchaser and will have no control over the bid submitted to the state. Furthermore, the corporation will not retain any interest in the tract after the sale when the bid is submitted to the state. We also note that it does not even appear certain that the state will accept the optionee/purchaser's bid to improve and lease the tract. Thus, the legislator's interest in any contract between the state and the optionee/purchaser, if such an interest even exists, is too remote and insubstantial to constitute an indirect interest within article III, section 18 of the constitution. *See* Attorney General Opinion JM-782 (1987) at 3 (legislator's interest in any contract with the state is too remote to be considered an indirect interest under article

²Community property may be treated differently in determining the reach of a statutory prohibition against a specific kind of interest, depending upon the language of the statute. *See* Attorney General Opinion JM-126 (1984) (public officer's community interest in husband's salary from health care provider is not a "substantial pecuniary interest in a facility" within disqualification provision of statute); Attorney General Opinion MW-437 (1982) (county commissioner is not interested in wife's salary as deputy tax collector within former article 2340, V.T.C.S., now section 81.002 of Local Government Code; overruling contrary conclusion in Attorney General Opinion H-993 (1977)).

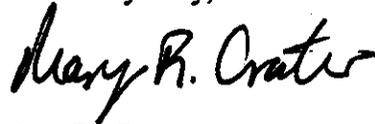
³There seems to be no question that the legislator would have an indirect interest in the contract separate and apart from an interest of the corporation. You state that neither the legislator nor the spouse has any interest in the optionee/purchaser, nor will they have any control over the bid submitted to the state by the optionee/purchaser or retain any interest in the land after the sale.

III, section 18). In sum, the facts of this transaction suggest as a matter of law that the legislator is not directly or indirectly interested in the contemplated contract between the state and the optionee/purchaser.

S U M M A R Y

The facts of this transaction suggest as a matter of law that for purposes of article III, section 18 of the Texas Constitution the legislator is not directly or indirectly interested in the contemplated contract between the state and the optionee/purchaser.

Yours very truly,

A handwritten signature in cursive script that reads "Mary R. Crouter".

Mary R. Crouter
Assistant Attorney General
Opinion Committee