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FILE NO. S-1492

STATE MATTERS:
Operation of Section 10.1 of
The Illinois Purchasing Act

Ted E. Leverenz, Chairman
Legislative Audit Commission
105 William G. Stratton Building
Springfield, Illinois 62706

Dear Mr. Leverenz:

I have your letter wherein you request my opinion on several questions relating to the interpretation of section 10.1 of The Illinois Purchasing Act (Ill. Rev. Stat. 1979, ch. 127, par. 132.10-1). Section 10.1 provides:

"No person or business entity shall be awarded a contract or sub-contract if that person or business entity: (a) has been convicted of bribery or attempting to bribe an officer or employee of the State of Illinois in that officer or employee's official capacity; or (b) has made an admission of guilt of such conduct which is a matter of record but has not been prosecuted for such conduct.

For purposes of this Section, where an official, agent, or employee of a business entity committed the bribery or attempted bribery on behalf of such an entity and pursuant to the direction or authorization of a responsible

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official thereof, the business entity shall be chargeable with the conduct."

You have asked:

"1. * * * Does the prohibition against awarding a contract or a sub-contract extend to contracts executed by the prime contractor for a State project?

2. Does the term sub-contract include agreements or contracts between the prime contractor and other parties for the acquisition or provision of materials for use in a State job?

3. If Section 10.1 is deemed applicable to contracts made by prime contractors of the State, are payments made by the State to the prime contractor illegal if the subcontractor had been found guilty of or admitted to bribery of a public official? * * *

4. * * * Do sections 10 and 10.1 void liabilities or contracts incurred or executed after the effective date and prior to the Polyvend, Inc. vs. Puckorious decision if the contractor or sub-contractor has admitted or been found guilty of the conduct proscribed by Section 10.1?

5. Section 10.1 uses the term 'business entity'. For purposes of this Section, does the prohibition against contracts or sub-contracts apply to a parent corporation whose subsidiary has been found guilty of or admitted to bribery of a public official? * * *"

Words as used in the statute should be taken to have their plain or ordinary meaning. (Droste v. Kerner (1966), 34 Ill. 2d 495, 503.) Black's Law Dictionary defines "award" as:

"To grant, concede, or adjudge to.
* * * One awards a contract to a bidder.
Jackson v. State, 194 Ind. 130, 142 N.E. 1, 2,
(holding that a finding that a contract was

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'awarded to' a bidder meant it was entered into with all required legal formalities)." (Black's Law Dictionary 174 (4th ed. 1968.)

If given this meaning, it seems clear that the prohibition set out in section 10.1 refers only to those business entities which enter into contracts with the State. Where the State is acting as its own prime contractor or as a prime contractor for the Federal government, contractors who in other situations would be considered the prime contractor are considered subcontractors. In this situation, the State would be awarding these subcontractors a contract and, therefore, they are subject to the requirements of section 10.1. In the more common situation, the State enters into a contract with a business entity to construct a project or supply goods. That contractor is awarded the contract. He then enters into other contracts to fulfill his obligations under the contract with the State. The subcontractor's rights and liabilities are governed by his contract with the prime contractor and not by the prime contractor's contract with the State. (Lichter v. Goss (7th Cir. 1956), 232 F.2d 715.) It cannot be said that in this situation the subcontractor is awarded a contract by the State and, therefore, the prohibition in section 10.1 can have no effect.

This consideration is further strengthened by an examination of other provisions in The Illinois Purchasing

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Act which are directed at preventing similar evils. Both section 11.1 and section 11.4 (Ill. Rev. Stat. 1979, ch. 127, pars. 132.11-1, 132.11-4) prohibit or restrict the awarding of contracts to business entities where certain individuals may receive a direct pecuniary interest. In each of these sections, the legislature has clearly expressed its intention that certain persons should not receive benefits from State contracts. While it cannot be argued that a subcontractor will not receive a benefit, section 10.1 limits the prohibition to those awarded State contracts. Section 10.1 does not speak to pecuniary interests. The legislature must be taken to have meant what they have said. City of Nameoki v. Granite City (1951), 408 Ill. 33, 37.

In view of the answer to your first question, it is not necessary to discuss your second or third questions.

With regard to your fourth question, the Appellate Court of Illinois, First District, in a decision rendered on June 7, 1978, held that section 10.1 of The Illinois Purchasing Act was unconstitutional. (Polyvend, Inc. v. Puckorius (1978), 61 Ill. App. 3d 163.) This decision was immediately appealed to the Supreme Court. The case was accepted for review on September 28, 1978. On October 2, 1979, the Court held that the statute was constitutional. (Polyvend, Inc. v. Puckorius (1979), 77 Ill. 2d 287.) It is the general rule that a

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case which is on appeal is a continuation of the same action. In effect, the matter remains before the courts. (Mackenzie v. Engelhard (1924), 266 U.S. 131, 142-43.) Therefore, the question of the constitutionality of section 10.1 was not definitively answered until the decision in the Illinois Supreme Court. However, a statute is presumed to be constitutional until a court in a case determines otherwise. Thus, since the court determined that in fact the Act was constitutional, it was always constitutional and in effect. (Chicot County Dist. v. Bank (1939), 308 U.S. 371-74.) It is my opinion, therefore, that contracts which were prohibited under section 10.1 were not made legal by the decision in the appellate court. Under the provisions of section 10 of The Illinois Purchasing Act (Ill. Rev. Stat. 1979, ch. 127, par. 132.10), these contracts are void.

The answer to your final question is found in the general principles of corporate law. Section 10.1 prohibits the awarding of a contract to any "business entity". A business entity may be any of a wide variety of legal forms under which individuals transact business. A corporation is usually considered a business entity. (Chicago Title and Trust Co. v. Central Republic Trust Co. (1939), 299 Ill. App. 483, 492.) The fact that a corporation is owned or controlled by another has no effect on its recognition as a

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separate business entity. (Superior Coal Co. v. Dept. of Finance (1941), 377 Ill. 282.) A corporation should not be prohibited from receiving contracts under section 10.1 merely because of its status as a parent or subsidiary corporation. It should be noted, however, that the corporate form will be disregarded where the form is used to defeat, evade or avoid a legislative purpose. Anderson v. Abbott (1944), 321 U.S. 349.

In view of the preceding discussion, it is my opinion that the prohibition set out in section 10.1 refers only to those business entities which enter into contracts with the State. It is also my opinion that all contracts which were awarded after the effective date of section 10.1 are subject to the requirements of that Act irrespective of the decision of the appellate court in Polyvend, Inc. v. Puckorius (1978), 61 Ill. App. 3d 163. Finally, it is my opinion that a corporation which meets all the requirements for independent corporate existence may not be prohibited from receiving a contract under section 10.1 merely because of its status as a parent or subsidiary corporation.

Very truly yours,

A T T O R N E Y G E N E R A L