

Opinion No. 54-5916

March 9, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. H. F. Scott State Purchasing Agent Santa Fe, New Mexico

{*357} A reply to your inquiry of January 21, 1954 has been delayed because of indications that the subject matter thereof might become the subject of litigation. As you know, this office follows a policy of refraining from expressing a view on such matters. This impediment has now been removed by a public announcement by the interested party that litigation is no longer contemplated. You request our interpretation of §§ 6-402 and 6-403 of the 1941 Compilation, giving a preference to local persons in certain situations. You particularly ask whether this section applies to contractors.

Section 6-403 provides as follows:

"6-403. PURCHASE FROM RESIDENT FIRMS REQUIRED -- EXCEPTIONS. -- All purchases of goods made by any purchaser to which this act is applicable shall be from manufacturers, distributors or detail establishments having or maintaining in the regular course of business merchandise inventories within the state upon which taxes are paid, provided, however where no facilities are available for the purchase of any particular goods within the state or where the same may be purchased at a saving of more than 5%, such goods may be purchased outside of the state." The provisions of this section shall not apply to any purchase in which the United States is interested involving the expenditure of federal funds."

The definition of "goods" is contained in § 6-402, which provides as follows:

"6-402. 'GOODS' DEFINED. -- The word 'goods' as used herein shall include all goods, wares, merchandise, materials, supplies, furniture, equipment and every article or thing of whatsoever description purchased for the use or benefit of any purchaser to which this act is applicable."

You will note that the definition of the term "goods" covers tangible items only. Your attention is also called to the provision of § 6-403 relating to purchases from manufacturers, distributors or retail establishments and it does not seem conceivable to us that a contractor was meant to be included within these terms by the Legislature. Any question as to this conclusion should be dispelled upon consideration of the provision of this section applying it to manufacturers, distributors or retail establishments "having or maintaining in the regular course of business merchandise inventories that no contractor maintains a merchandise inventory, for a contractor is not in the business of selling merchandise.

With respect to the particular contract to which you refer, being the contract for construction of the first phase of a new State Penitentiary, your attention is called to § 6-501 of the 1941 Compilation, which provides as follows:

{*358} "6-501. PUBLIC BUILDING CONTRACTS TO BE WITH NEW MEXICO CONTRACTORS. -- From and after the passage and approval of this act, it shall be the duty of every office, department, institution, board, commission or other governing body or officer thereof of this state or any county municipality, school district or other political subdivisions thereof to award all contracts for the construction of public buildings or structures, or for repair or alteration thereof, to a New Mexico contractor or contractors, whenever practicable."

Your attention is also called to § 6-502, providing as follows:

"6-502. 'NEW MEXICO CONTRACTOR' DEFINED -- For the purpose of this act, a New Mexico contractor or contractors is defined to be:

"(a) A person or persons who are residents of, and qualified electors in the state of New Mexico, or corporations incorporated under the laws of this state and who maintain their principal office or place of business, and are taxpayers in this state.

"(b) Foreign corporations authorized to do business under the laws of this state, or individuals who are residents of another state, or firms which maintain their principal office or place of business in another state, but which have maintained a permanent business in good faith, in an established office, and have been taxpayers in this state for a period of two (2) years, prior to any contract herein contemplated."

Inasmuch as these sections were not specifically repealed at the time of the passage of §§ 6-402 and 6-403 and inasmuch as they are clearly not repealed by necessary implication, it is our opinion that §§ 6-501 et seq. cover the field insofar as contracts for construction, repair or alteration of public buildings are concerned and that §§ 6-402 and 6-403 have absolutely no application thereto.

Insofar as contracts concerning the Penitentiary are concerned, your attention is directed to § 45-115 of the 1941 Compilation, requiring the bid to be accompanied by a certified check in the amount of 10% of the bid.

By: Walter R. Kegel

Assist. Attorney General