

Opinion No. 58-235

December 17, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Alfred P Whittaker, Assistant Attorney General

TO: Glen S. Albright, Brig., General, NMARNG Office of the Adjutant General, Santa Fe, New Mexico

QUESTION

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May the State Armory Board lawfully contract with the United States for the construction of an armory at the expense of the State and Federal government jointly, the armory to be used jointly by the New Mexico National Guard and other components of the Armed Forces Reserves?

CONCLUSION

Yes.

OPINION

ANALYSIS

The State Armory Board is planning to build a two-unit National Guard Armory, 25% of the cost of which will be paid by the State, and 75% by the United States. We understand that the state funds for this purpose will be derived from an appropriation which is to be requested from the Twenty-Fourth Legislature. The National Guard Bureau has requested that the new facility be subject to joint utilization, i.e., to use by other components of the Armed Forces Reserves. In this opinion we assume that the joint utilization contemplated leaves to the state agency substantial control of the operation and use of the premises for the construction of which state funds are appropriated.

The statute which sets forth the powers of the State Armory Board and places title to all armory and military sites in the State Armory Board, § 9-7-3 (N.M.S.A., 1953) expressly authorizes the State Armory Board to contract with the United States for construction at the joint expense of the United States and the State. In material part this provision reads as follows:

"The state armory board is authorized to enter into contracts in behalf of the state with the United States government or any of its agencies for the purpose of participating in

any joint federal-state military construction program, or for the purpose of receiving federal money for military construction."

Joint utilization is provided for in 10 U.S.C.A. § 2236 (a), as amended by P.L. 85-861 (72 Stat. 1437, approved 9]2]58), which states as follows:

"Contributions under section 2233 of this title are subject to such terms as the Secretary of Defense, after consulting the Committees on Armed Services of the Senate and the House of Representatives, considers necessary for the purposes of this chapter. Except as otherwise agreed when the contribution is made, a facility provided by a contribution under section 2233 (a) (3) or (4) of this title may be used jointly by units of two or more reserve components of the armed forces **only to the extent that the State** or Territory, Puerto Rico, or the District of Columbia, whichever is concerned, **considers practicable.**" (Emphasis supplied)

The armory which is the subject of your inquiry falls within the terms of Section 2233 (a) (4), so that the quoted provision applies.

We conclude that there is no objection to joint utilization of the proposed facility.

In reaching this conclusion two provisions of the Constitution of New Mexico require careful consideration. These provisions in relevant part read as follows:

Article IX, Section 14:

"Neither the state, nor any county, school district or municipality, except as otherwise provided in this Constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, . . ."

Article IV, Section 31:

"No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state, but the legislature may, in its discretion, make appropriations for the charitable institutions and hospitals, for the maintenance of which annual appropriations were made by the legislative assembly of nineteen hundred and nine."

Article IX, Section 14 has been before the Court for construction on several occasions, and the Court has not hesitated to invalidate legislation construed as authorizing the pledge of the state's credit in aid of private corporations. **In Hutcheson v. Atherton** 44 N.M. 144 (1940) the Court held invalid a proposed county bond issue as in violation of this constitutional provision where the purpose of the bond issue was to provide funds for the construction of an auditorium with the major purpose of assisting the Coronado Corporation, a corporation organized to conduct an exposition commemorating the 400th Anniversary of the arrival in New Mexico of Francisco Vasquez de Coronado.

In **State ex rel Mechem v. Hannah**, 63 N.M. 110 (1957) the Court struck down a statute appropriating money to the State Board of Finance to be used in connection with a federal-state agreement for the roughage drought feed program, as in violation of this section, as a donation of public money to private individuals, not authorized by Article IX, Section 14.

In our view, these cases do not require the conclusion here that there is any donation or lending of credit in violation of Article IX, Section 14. In overruling a contention based on this constitutional provision in **Village of Deming v. Hosdreb Company** 62 N.M. 18, 28 (1956), Mr. Justice Sadler's opinion discussed the meaning of the term "donation" as used in the constitutional provision as construed in earlier cases cited. The Court had this to say:

"We think it fair to say from a review of the cases cited dealing with the term 'donation,' as found in this proviso of the Constitution, that the word has been applied in its ordinary sense and meaning, as a 'gift,' and allocation or appropriation of something of to a 'person, association or value, without consideration public or private corporation.'"

In this case, pursuant to written agreement between the United States through its National Guard Bureau and the State of New Mexico, the parties agree to construct an armory, upon certain specific terms and conditions, and particularly each party agrees to bear a specified share of the construction costs as provided by law. Under the construction of the term "donation" above quoted, and under orthodox principles of contract law, it appears to us that the proposed project involves no donation, but is supported by sufficient consideration. See, e.g., 17 C.J.S., Contracts Sec. 74 et seq., p. 425.

Neither do we find that the proposal involves any infraction of Article IV, Section 31 of the New Mexico Constitution. The proposal is to obtain an appropriation of funds to the State Armory Board, an agency of the state of New Mexico, and to apply such appropriation to the construction of an armory. This is a purpose expressly contemplated by the authorizing legislation (Sec. 9-7-2 et seq., N.M.S.A. 1953), which itself is enacted pursuant to constitutional provisions for the organization and purposes of the militia (Art. XVIII; Art. V, Sec. 4). Obviously, provision for the public defense is one of the paramount purposes of government. An appropriation to a state agency for a public purpose has been recognized as in compliance with a similar constitutional provision although used in the performance of an agreement with a federal agency which loaned or granted funds to the state. See **State v. Cooney**, 47 P. (2d) 637, 645 (Mont. 1935). That case upheld an appropriation to a state agency for an irrigation and flood control project, ownership and control of which was to remain in the state agency, but which was to be financed in part by the loan and grant of federal funds. See also **Garvey v. Trew**, 170 P. (2d) 845 (Ariz., 1946), cert. den. 329 U.S. 794, upholding an appropriation to a state corporation commission, charged by law with the regulation of public utilities, which appropriation was to be applied to pay expenses incurred by the Federal Power Commission in making an investigation to determine valuation for rate purposes of the state's utilities.

The instant case cannot be viewed as involving an appropriation made to a person, corporation, association, institution or community "not under the absolute control of the State", within the meaning of Article IV, Section 31. **Harrington v. Atteberry**, 21 N.M. 50 (1916) involved a statute authorizing counties to appropriate county funds to a private corporation organized to conduct a county fair; and since the Court concluded that neither state nor county had any control over the operation of the corporation and its property, profits and income, it invalidated the statute as in violation of Article IV, Section 31. In the instant case, the State Armory Board is a creature of the state, under its absolute control.

Based upon careful review of the authorities, this office finds no violation of either provision of the state constitution quoted above, under the facts stated.