

Opinion No. 59-172

October 27, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Mr. Donn E. Hopkins Acting State Planning Officer P. O. Box 1359 Santa Fe, New Mexico

{*265} This is written in reply to your recent request for an opinion on the following questions:

1. What professional services, if any, are exempt from the bid procedure requirements of state law related to purchases?
2. Are the professional services described in the attached contract forms subject to the bid procedure requirements of state law related to purchasing?

In answer to your questions, it is our opinion that:

1. Only those professional services which are classed as personal services are exempt.
2. Yes, the services in the attached contracts are subject to the bid procedure absent action of the State Board of Finance declaring an emergency to exist.

The answers to your questions termed on the language of the State Purchasing Act, or more specifically, Section 6-7-3, N.M.S.A., 1953 Comp. reads in part as follows:

"The state purchasing agent, . . . shall make and execute for the state and each department thereof all contracts for buildings and repair thereof, or for any improvements upon any property of the state or any department thereof, and **every character of service, other than personal services, usually provided for by contract.**" (Emphasis Supplied)

If a contract is one of the types mentioned above but not exempted, then it must be submitted on bids, as provided in Section 6-7-4, N.M.S.A., 1953 Comp.

The problem involved in your questions is, therefore, whether professional services and more specifically, the professional services provided for in the attached contracts are personal services and exempted or whether these types of services are other services and subject to the Act.

The Supreme Court of New Mexico has never had occasion to define the words "personal services" so we must look to the definitions spelled by other courts to determine what exactly the legislature intended when it used the words "other than personal services." A California Court had an opportunity to construe the words in

question in the case of **Levitt v. Faber, et al.**, 20 Cal. Apl 2d Sub 758 64 P. 2d 498. The Court therein said:

"'Services' and 'professional services' are not definitively coextensive. Within the meaning of statutes such as that now under consideration and of exemption statutes, 'services' may be rendered though the actual labor be performed by one's employees and by means of his machinery or other equipment, but 'personal services' are those performed by the individual himself."

While a California Court in the above case was not construing a purchasing statute as is here involved, it is our opinion that the Supreme Court of New Mexico, if called upon to define "personal services" as found in Section 6-7-3 would apply this distinction between "services" and "personal services" in view of the wording of the section. The legislature certainly intended to draw some distinction when it used the words ". . . every character of service, other than personal services, . . .". The only logical distinction to be drawn is the one drawn by the California Court between services generally and personal services.

{*266} It is therefore our opinion that those professional services which are performed by an individual himself are exempt from the requirements of the State Purchasing Act. Such exempted services might be those of lawyers, doctors, and etc.

From an examination of the submitted contracts, it is our opinion that the services contemplated in these contracts are not personal services within the meaning of the statute and must be awarded by the bidding process. In so holding, we are not unmindful of the difficulty and possibility of obtaining substandard professional services inherent in our holding. We are, however, bound by the language used by the legislature in the statute. Any change must come from the legislature, since it is not our function to read something into a statute which the legislature, from its language, did not intend.

Boston E. Witt

Assistant Attorney General