

Opinion No. 61-16

February 8, 1961

BY: OPINION OF EARL E. HARTLEY, Assistant Attorney General F. Harlan Flint,
Assistant Attorney General

TO: Mr. William H. Hendrix, State Purchasing Agent, State Capitol Building, Santa Fe,
New Mexico

QUESTION

QUESTIONS

1. What is meant by "competitive price" as the term is used in § 6-7-14, N.M.S.A., 1953 Comp. (P.S.) and who makes this determination that a price is competitive?
2. Has § 6-7-3, N.M.S.A., 1953 Comp. been repealed?
3. Must state agencies carry Workmen's Compensation?

CONCLUSIONS

1. See analysis.
2. See analysis.
3. See analysis.

OPINION

ANALYSIS

Your first question was with reference to the instate preference provided by § 6-7-14, N.M.S.A., 1953 Comp. (P.S.). That section reads as follows:

"Whenever bids shall be received on goods manufactured within this state in competition with bids on goods manufactured elsewhere, the goods manufactured in this state shall be preferred, whenever the price therefor does not exceed the established competitive price for such goods.

The above section is a 1955 addition to the State Purchasing Agent Act compiled as Sections 6-7-1 to 6-7-13, N.M.S.A., 1953 Comp. With regard to the above-quoted section, your questions are "What is 'competitive price'?" and "Who makes the determination that the price is competitive?" Unfortunately, the statute provides us with no definition of the term "competitive price" and we are, therefore, obligated to attempt

such definition by consideration of its use in this statute and the functions of the State Purchasing Agent. It is apparent that the legislature desired that preference be given to locally manufactured goods where such preference would not injure the state by requiring the payment of an excessive price. In the absence of legislative guidance, we conclude that the established competitive price must be determined upon the basis of each individual transaction. If the purchase under consideration is of a large quantity of goods which may be purchased at wholesale, the competitive price would be the going rate for the goods at wholesale within the market available to the State Purchasing Agent. If the goods must be purchased at retail, we conclude that the State Purchasing Agent would not violate the law by accepting a bid which sets a price above wholesale cost of the goods. It is apparent that the section under consideration does not give the same advantage to the locally manufactured goods as was guaranteed by Sec. 6-5-3, N.M.S.A., 1953 Comp., of the older Public Purchasing Act. We, therefore, conclude that if an out-of-state bid and an in-state bid were equal, preference would be given to the in-state bid. However, if the best in-state bid exceeds the best acceptable out-of-state bid, the preference could not be given. We further conclude that the State Purchasing Agent is the officer who by the statute is given the discretion to determine what is the competitive price for goods purchased pursuant to the State Purchasing Agent Act. In the absence of statutory law to the contrary, this conclusion is demanded and considerable discretion would be given to the State Purchasing Agent in making such determination.

Your second question asks if Sec. 6-5-3, N.M.S.A., 1953 Comp., has been repealed. This section is a portion of the Public Purchasing Act compiled as Secs., 6-5-1 to 6-5-11, N.M.S.A., 1953 Comp., as amended. The particular section under consideration provides that as regards the purchases of goods by any purchaser subject to the Act, a 5% advantage shall be given to in-state purchases. Your question regarding this section is undoubtedly motivated by the apparent conflict between this section and the aforementioned Sec., 6-7-14. The New Mexico Supreme Court has ruled upon your question in the case of **State v. Valdez**, 59 N.M. 112, 279 P. 2d 868. The Court therein declared that although repeals by implication are not favored where two statutes have the same object and relate to the same subject, if the later is repugnant to the former, the former is repealed by implication **to the extent of the repugnancy** in the absence of a repealing clause in the later act. The Court, in effect, ruled that the Public Purchasing Act (Sec. 6-5-1, et seq.) was repealed by implication by the State Purchasing Agent Act (Sec. 6-7-1, et seq.) except as to those agencies not covered by the later act. To determine which agencies are not covered by the State Purchasing Agency Act, we refer you to Sec. 6-7-1 which defines the word "department" as it is used in the State Purchasing Agent Act. You will note that the term is applied to all state departments, offices, boards, commissions, bureaus, state institutions and other state agencies except the judicial branch of government and counties, school districts and municipalities. Our answer to your question is that the subject section is repealed as to all governmental units except counties, school districts and municipalities which are still subject to the older Public Purchasing Act.

Question No. 3 requires us to refer to the Workmen's Compensation law, which is compiled as Secs. 59-10-1 to 59-10-37, N.M.S.A., 1953 Comp. It is impossible to give a yes or no answer to your question in the abstract since the act is applicable to different state agencies in varying degrees. It would, therefore, be necessary to consider each state agency in and of itself to determine whether it is subject to the act. We shall, however, direct you to various sections of the act which will aid you in making this determination. Sec. 59-10-2, N.M.S.A., 1953 Comp., described the agencies which do or may come within the provisions of the act. You will note that certain governmental units may be subject to the act if engaged in extra-hazardous occupations or pursuits and if the employer and employees have either expressly or impliedly accepted and agreed to be bound by the act. The extra-hazardous occupation to which the act applies are defined in Sec. 59-10-10. The last sentence of Sec. 59-10-3 excepts the state from the requirement of giving a bond, security or undertaking to secure payment of compensation. Sec. 59-10-4 outlines the test to be used in determining whether the employer and employee have accepted and made themselves subject to the act.