

## **Opinion No. 61-60**

July 17, 1961

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

**TO:** Robert D. Castner, State Auditor, State Capitol, Santa Fe, New Mexico

### **QUESTION**

#### QUESTIONS

1. Does the Village of Ruidoso have the power to bind itself by Ordinances to have a water and sewer bond account audited by a Certified Public Accountant?
2. Is this opinion equally applicable to all state agencies and local public authorities as defined in Section 4-4-2.1, N.M.S.A., 1953 Compilation (P.S.)?

#### CONCLUSIONS

1. See analysis.
2. Yes.

### **OPINION**

#### ANALYSIS

We are advised that by Ordinance No. 102, the Village of Ruidoso issued a \$ 296,000 water and revenue bond on July 1, 1958. The authorizing ordinance provided that within 60 days after the close of the fiscal year the receipts and disbursements of the account should be audited by a certified public accountant. You have raised the question of whether such a covenant would be illegal as contravening the provisions of the Public Accountancy Act. (Sections 67-23-1, et seq., N.M.S.A., 1953 Compilation), and the statutory provisions covering the State Auditor (Sections 4-4-2.1, et seq., N.M.S.A., 1953 Compilation (P.S.)).

We have declined to give an unequivocal answer to this question since varying circumstances might require different conclusions. However, upon the basis of facts which we shall assume for the purposes of this opinion, we conclude that the above referred to provision is valid. In order to reach this conclusion we assume that the provision adopted by ordinance applies solely to the specific bond issue which was authorized by that ordinance. We further assume that the ordinance provision in no way purports to substitute itself for the statutory provision covering annual audits. We assume that the requirement that the bond account be audited by a certified public

accountant is a provision inserted at the behest of revenue bond experts to improve the salability of the bonds by way of added assurances to the investor that his investments will be secure.

We shall attempt to explain our reasons for concluding that the above assumptions are necessary.

If such a provision is meant to effect the conduct of a regular state audit by prescribing that the audit be done only by a certified public accountant, then, in our opinion, it is clearly invalid since we have recently ruled that the State Auditor may approve audit contracts to be performed by either certified public accountants or registered public accountants. (See Attorney General's Opinion No. 60-106).

If the municipality attempted by ordinance to require annual audits of all municipal functions to be performed by a certified public accountant, it would thereby attempt to impose a local law more restrictive than that contained in New Mexico law. Section 4-4-2.3 provides that:

". . . annual audits shall be conducted by the State Auditor, personnel of his office designated by him, or by independent auditors approved by the state auditor.

It is, therefore, readily apparent that a provision requiring annual audits to be performed by a certified public accountant might in some instances prevent the state auditor or designated personnel of his office from conducting audits which are permitted to be made by them under the subject statute.

On the other hand, if the provision in the Ruidoso Ordinance is of the type which is intended to refer only to additional audits over and above the annual state audit, we would rule that the provision is enforceable. The latter alternative is assumed to be the case here and is the basis for our affirmative answer to your first question.

One further point should be made in clarification of the above. This opinion should not be construed as necessarily requiring a separate audit of the bond account. The bond account may be audited as a portion of the annual audit of all municipal functions, if a certified public accountant has been approved by the State Auditor as a person who may conduct such annual audit pursuant to the provisions of Section 4-4-2.7.

In summary, it is our conclusion that a municipality may not restrict the powers of the State Auditor by means of Ordinances. However, where it is expedient for the purpose of increasing the marketability of municipal bonds or for other proper purposes, to require an audit by a certified public accountant, the municipality may so provide without affecting statutory provisions governing annual audits.

Your second question may be answered quite simply. Sections 4-4-2.1, et seq., make no distinctions between local public bodies and state agencies as regards the questions

considered here. Therefore, the dictates of this opinion are equally applicable to all state agencies and local public bodies as defined in Section 4-4-2.1.