

Opinion No. 61-92

September 28, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

TO: Mr. Robert Castner, Secretary, State Board of Finance, Santa Fe, New Mexico

QUESTION

In presenting the question set forth below, the following background information was furnished. At a meeting of the State Board of Finance held September 20, pursuant to the provisions of Chapter 127, Laws 1961, bids for voting machines to be purchased for the State of New Mexico were received. E. S. (Johnny) Walker, State Land Commissioner, doing business as Johnny Walker Enterprises, submitted the low and best bid for the machines in question, which bid was accepted by the State Board of Finance.

QUESTION

Will the awarding of a contract to Johnny Walker Enterprises and its acceptance of such a contract be in violation of any State laws dealing with conflict of interest or other related subjects?

CONCLUSION

No.

OPINION

ANALYSIS

In this jurisdiction there are three separate legislative acts which deal generally with sales and purchases by the State. The first to be enacted was the Public Purchases Act of 1939 (Sections 6-5-1 through 6-5-8, N.M.S.A., 1953 Comp.). Next came the State Purchasing Agent Act of 1943 (Sections 6-7-1 through 6-7-13, N.M.S.A., 1953 Comp.). The latest statutory enactment in this area was passed by the 1961 Legislature as Sections 6-5-12 through 6-5-16, N.M.S.A., 1953 Comp. (PS).

In 1955, our Supreme Court was called upon to judicially determine the relationship between the Public Purchases Act and the State Purchasing Agent Act. **State v. Valdez**, 59 N.M. 112, 279 P. 2d 868. The Court held that the two statutes had the same object and related to the same subject matter and thus the later State Purchasing Agent Act was controlling except as to agencies and departments specifically exempt from its operation.

We point this out because the two Acts contain different provisions as to what might loosely be called a conflict of interest in selling to or purchasing from the State. Now, while the purchaser in the present case, the State Board of Finance, is governed by the State Purchasing Agent Act rather than the Public Purchases Act, we deem it advisable to discuss the provisions in each. Our reason is that there seems to be considerable public confusion in the area of purchases by the State resulting in the possibility of unwarranted criticism of public officials.

Looking first at the Public Purchases Act, we find that Section 6-5-6 thereof provides that

"No **purchaser** shall be or become personally financially interested, either directly or indirectly, in any purchase or contract covered by this act * * *" (Emphasis added).

By its express terms, this provision applies not to the seller but only to the purchaser. At the time of its enactment, department heads did their own purchasing. Accordingly, this provision was designed to prohibit such public officials from buying supplies from firms in which they had some sort of financial interest unless the following mandates contained in this same section were complied with:

"provided nothing herein contained shall prevent purchases being made from any established concern, firm or corporation doing a general business in which a member of a board, commission, governing body, official, agent or employee, to which this act is applicable, is interested **when the goods purchased are sold and purchased as provided in this act in the regular course of business or upon competitive bids at not to exceed the regularly established retail or list price and when such member or official receives no compensation or reward on account of the transaction other than from the profits of such business.**" (Emphasis added).

Our information is that none of the members of the State Board of Finance, the purchaser in this case, has any personal financial interest in Johnny Walker Enterprises. Nor is the Land Commissioner a member of this Board. Hence, even were the Finance Board governed by this section of the Public Purchases Act, there would be no legal impediment to the proposed purchase. Further, it should be noted that the seller met all the requirements of Section 6-5-6, supra. The voting machines were sold and purchased upon competitive bids and the selling price is not in excess of the regularly established retail or list price. Nor, as we understand it, did the seller give "any discount, rebate or other reward" designed for the personal benefit of the purchaser, a practice which is prohibited under Section 6-5-7, N.M.S.A., 1953 Comp.

Turning now to the State Purchasing Agent Act, the statutes designed to at least partially centralize public purchases, and the Act which governs purchases by the Finance Board, it is seen that only one provision is contained therein relative to prohibited purchases. Section 6 - 7 - 13, N.M.S.A., 1953 (PS), provides in pertinent part as follows:

"Neither the **purchasing agent nor any subordinate or employee** shall receive from any person, firm or corporation who may bid or offer to bid for the furnishing of any supplies or the making of any contract of any kind, any commission, fee, rebate, gift or other valuable thing, and shall not be interested directly or indirectly as a partnership, agent, stockholder, employee or otherwise in any firm, partnership, association or corporation bidding upon or furnishing any supplies or bidding upon any such contract." (Emphasis ours)

The reason for making the prohibition applicable only to the purchasing agent and his subordinates becomes obvious upon analysis. Except in the case of certain small purchases and emergency purchases (Sections 6-7-4 and 6-7-5, N.M.S.A., 1953 Comp. (PS)), it is the bonded purchasing agent who handles the necessary purchases for the departments under his jurisdiction. Section 6-7-3, N.M.S.A., 1953 Comp. Here again, there is no legal obstacle to the proposed transaction.

As mentioned earlier, the latest enactment in this general area was by the 1961 Legislature. Sections 6-5-12 through 6-5-16, N.M.S.A., 1953 Comp. (PS). After the most intensive study and examination of these sections, we have concluded that they are aimed at preventing a public official from **secretly** dealing with the State as an undisclosed agent for either a seller or purchaser. In common parlance, this legislation is a "full disclosure-anti-kickback" law.

While in actuality the State is either the seller or the purchaser in the transactions covered by the 1961 Act, this law does not, and was never intended to, prevent a public official from receiving money **from the State** for goods sold thereto. What it does prohibit, unless the full disclosure exception provision is complied with, is a public official receiving anything of value **from the seller** when goods are sold **to** the State and from receiving anything of value **from the purchaser** when goods are sold **by** the State. In other words, it is designed to preclude a public official from acting as an undisclosed agent for a **seller to** or **purchaser from** the State and receiving something of value from such seller or purchaser.

We do not have such a situation here. Johnny Walker Enterprises is not acting as an agent for the seller; it **is** the seller. According to our information, Johnny Walker Enterprises, which firm submitted the low and best bid for the voting machines in question, is a regularly established business concern in this State which is, and has been for a number of years, the duly franchised distributor of the machines which the State Board of Finance voted to purchase.

Since there is no undisclosed agency relationship involved in the proposed transaction, there is no legal requirement whatever that the exception provision contained in the 1961 Act be utilized. The exception provision is a guaranty that in **every** case covered by the Act full disclosure of the public official's relationship with the seller to or purchaser from the State will be made. It permits a public official, unless prohibited by other statutes, to act as an agent for a seller of goods to the State or as an agent for a purchaser of goods from the State so long as the following requirements are met: (1)

prior written consent is obtained from the head of the department involved in the transaction; (2) this consent is filed in the office of the Secretary of State; (3) after the transaction is completed a statement is filed in the office of the Secretary of State listing the services rendered and the remuneration received therefor. Section 6-5-13, supra.

Being new legislation, the "full disclosure-anti-kickback" law has not been judicially interpreted or construed. But due to the stringent penalty provisions contained in this legislation, and since the transaction here involved has not yet been consummated (the contract has not been signed and thus there has been no actual sale), for the protection of both the Board of Finance and the public official here involved, each should comply with the procedures set forth above. It is our opinion that compliance with the exception procedure is not required, but it is recommended in order to foreclose any possibility of a subsequent attack on the transaction.