

## Opinion No. 62-80

June 29, 1962

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

**TO:** Senator Fabian Chavez, Jr., Majority Floor Leader, New Mexico State Senate, P. O. Box 122, Santa Fe, New Mexico

### QUESTION

#### QUESTIONS

1. Under Section 6-6-1 through Section 6-6-4 N.M.S.A., 1953 Compilation, can New Mexico Contractors be precluded from bidding or fail to be awarded a contract if they are low bidder and can furnish the required bond from a bonding company qualified to furnish such bond?
2. Under Section 6-6-4 N.M.S.A., 1953 Compilation, it is provided that "all contracts executed in violation of this Act (Sections 6-6-1 to 6-6-4 N.M.S.A.) shall be void and of no effect." If the answer to question number one is in the affirmative, would such contract be void and what would be the possible liability of any persons paying monies under such void contract?
3. Under the provisions of Section 6 - 7 - 4 N.M.S.A., 1953 Compilation (P.S.), does the Interstate Streams Commission have the authority to let this contract or must it be done by the State Purchasing Agent and subject to the State Purchasing Agent's Rules and Regulations?
4. Under Section 6-7-4 N.M.S.A., 1953 Compilation (P.S.), can prequalification be a condition preceding the obtaining of plans and specifications and entering a bid on the project and being awarded such bid, if low?
5. If prequalification of bidders is authorized by the statutes involved, must prequalification set out specific standards?
6. Does the refusal of the Interstate Streams Commission to divulge the names of the prequalified contractors and those refused prequalification violate the provisions of Section 71-5-1, et seq, N.M.S.A., 1953 Compilation, after proper demand has been made?
7. Section 5-1-5, N.M.S.A., 1953 Compilation, provides among other things that any construction contract employing the use of state money requires the employment of not less than ninety percent (90%) New Mexico residents of each class of labor. Does this Section apply to the award of this contract?

## CONCLUSIONS

1. New Mexico contractors may not properly be precluded from bidding upon public works construction projects financed from state funds. Under the State Purchasing Act, however, the State Purchasing Agent is invested with certain discretion in the awarding or rejection of bids.
2. See analysis.
3. The procedure for the award of the contract must be in accordance with the provisions of the State Purchasing Act, Sections 6-7-1, et seq., N.M.S.A., 1953 Compilation.
4. No.
5. See analysis.
6. See analysis.
7. Yes.

## OPINION

### ANALYSIS

Under the factual situation set forth in your letter of inquiry, the questions propounded therein arise by reason of the fact that the Interstate Streams Commission has begun steps to let a contract for the construction of the proposed Ute Dam, spillway and appurtenant works on the Canadian River near Logan, New Mexico, and the commission has announced that no New Mexico contractor will be allowed to bid upon such project. As pointed out in your letter also, the proposed project is to be financed entirely from state funds. In undertaking such project, the Interstate Streams Commission has employed the Betchel Corporation, a California Corporation, as the engineering concern to design and supervise the construction of such public works project, and such concern has determined that no New Mexico Contractor by virtue of prequalification requisites, is qualified to bid upon the project.

For purposes of continuity and brevity we will consider your first three questions jointly.

Under Section 6-6-1, N.M.S.A., 1953 Compilation, the Legislature has specifically provided that all public building contracts let by a public body in New Mexico shall be awarded whenever practicable to New Mexico contractors. This section provides that:

"From and after the passage and approval of this act, it shall be the duty of every office, department, institution, board, commission or other governing body or officer thereof, of this state or any county, municipality, school district or other political subdivision thereof

to award all contracts for the construction of public buildings or structures, or for repair or alteration thereof, to a New Mexico contractor or contractors, whenever practicable."

Section 6-6-2, N.M.S.A., 1953 Compilation, defines the term "New Mexico Contractor" as follows:

"For the purpose of this act, a New Mexico contractor or contractors is defined to be:

(a) A person or persons who are residents of, and qualified electors in the state of New Mexico, or corporations incorporated under the laws of this state and who maintain their principal office or place of business, and are taxpayers in this state.

(b) Foreign corporations authorized to do business under the laws of this state, or individuals who are residents of another state, or firms which maintain their principal office or place of business in another state, but which have maintained a permanent business in good faith, in an established office, and have been taxpayers in this state for a period of two (2) years, prior to any contract herein contemplated."

In addition to the above provisions, Section 6 - 6 - 4, N.M.S.A., 1953 Compilation, specifies that:

"All contracts executed in violation of this act (6-6-1 to 6-6-4) shall be void and of no effect."

It is manifest from a careful study of the legislation relating to the awarding of contracts for the construction of public works, that the Legislature intended that whenever practicable New Mexico contractors will be given first consideration in the building of public projects. From the broad language employed in such statutes, it is evident also, that the provisions of the above legislation have application to the proposed construction project to be awarded by the New Mexico Interstate Streams Commission.

The statutes creating the Interstate Streams Commission, and which specify the duties, powers and authority of that commission, are set out in Sections 75-34-9, et seq., N.M.S.A., 1953 Compilation. Section 75-34-11, N.M.S.A., 1953 Compilation, invest the commission with the authorization to construct public projects for the conservation, development, distribution and utilization of water in New Mexico. This section provides in part as follows:

"The commission is hereby authorized to construct, whenever it shall deem such construction expedient, any works as hereinabove defined, the cost of such construction to be paid wholly by means of or with the proceeds of revenue bonds hereinafter authorized, or in connection with a grant to aid in financing such construction from the United States of America or any instrumentality or agency thereof, or with other funds provided under the authority of this act. Before constructing any project the commission shall make estimates of the cost of the project, of the cost of maintaining, repairing and operating the same, and of the revenues to be derived therefrom, and no such project

shall be constructed unless, according to such estimates, the revenues to be derived therefrom will be sufficient to pay the cost of maintaining, repairing and operating the same, and to pay the principal and interest of revenue bonds which may be issued for the cost of such project; . . ."

Further inquiry into the problems presented, necessitates an examination of the State Purchasing Act, and the applicable provisions contained therein relating to the award of public contracts.

As stated in Section 6-7-1, N.M.S.A., 1953 Compilation, the provisions of the State Purchasing Act have specific application to any state commission or other state agency. Section 6-7-11, N.M.S.A., 1953 Compilation (P.S.), lists specific exemptions from the application of the act for enumerated departments and agencies, but does not mention the Interstate Streams Commission.

Section 6-7-4, N.M.S.A., 1953 Compilation, of the State Purchasing Act, sets out in detail the procedure for the award of state contracts for public construction work. This section provides in applicable part as follows:

"A. The purchase of all supplies and the letting of all contracts shall be based upon sealed competitive bids when the estimated expenditure exceeds the sum of one thousand dollars (\$ 1,000) . . . . In all cases where sealed bids are to be received, the purchasing agent shall post a notice of the bidding on a bulletin board in his office, and shall advertise for bidders by publication in at least three daily newspapers or periodicals, within or without the state, which appear to the purchasing agent to be advisable to secure general bidding on proposed purchases or contracts. Notices and advertisements shall appear in the newspapers or periodicals at least five days before the date for opening bids. The Purchasing Agent shall also mail copies of the notice of bidding to the post office address of prospective bidders who, in the opinion of the purchasing agent, may be interested in furnishing supplies or bidding upon other service let by contract.

B. In submitting offers for bids, definite and complete specifications of the grade, quality, and standard of the supplies sought to be purchased shall be available for prospective bidders, sufficient to enable them to make and prepare an intelligent bid for the article sought to be purchased. **In seeking bids for construction work of any kind, plans and specifications relative thereto shall be made available for prospective bidders to enable them to reasonably prepare and submit bids.**

C. The purchasing agent is authorized and empowered to make reasonable rules and regulations governing the preparation and submission of bids to facilitate the work of his office, and may prescribe by rules the standards of quality and construction as seem to him best for the public service. The purchasing agent shall determine the amount and character of the bond or deposit which shall accompany all bids; provided, that in the event of an emergency requiring speedy action in the purchase of any supplies, or the

letting of any contract, the purchasing agent may act without submitting bids as required in this section. . . ." (Emphasis supplied).

From a careful reading of the above statutes, it is apparent that the Legislature clearly intended that public construction projects come within the safeguards of the State Purchasing Act, and be awarded whenever practicable to New Mexico contractors.

The Interstate Streams Commission, by virtue of the statutory authority creating the commission, is invested with the exclusive right of determination as to the necessity for the construction of public "works" relating to the conservation and utilization of water in this state, and the commission similarly possesses the right to control any plans or specifications incident to the construction of such public works projects, or the supervision and progress of such works projects.

Once the commission has made the determination that a public works project financed from state funds is to be entered into and approves the plans and specifications for such work, then the provisions of Section 6-6-1, et seq., N.M.S.A., 1953 Compilation, relating to the giving of preference to New Mexico contractors are applicable, and Sections 6-7-1, et seq., N.M.S.A., 1953 Compilation, relating to the State Purchasing Act must be complied with.

Subsection B of Section 6-7-4, N.M.S.A., 1953 Compilation, under the State Purchasing Act, definitely contemplates that all New Mexico contractors are to be entitled to have access to the plans and specifications for construction work. This section states in part:

"In seeking bids for construction work of any kind, plans and specifications relative thereto shall be made available for prospective bidders to enable them to reasonably prepare and submit bids."

In light of the above, it is our conclusion that in respect to your first question, any New Mexico contractor as defined in Section 6-6-2, N.M.S.A., 1953 Compilation, supra, may not be precluded from bidding upon a state public works project financed exclusively from state funds. Whether or not such New Mexico contractor would in fact be entitled to the award of such contract upon the basis of his bid submitted under the State Purchasing Act, if such bid were low and if a required bond from a qualified bonding company were furnished, would be a matter within the determination of the State Purchasing Agent and subject to the provisions of the State Purchasing Act.

Section 6-7-4, N.M.S.A., 1953 Compilation, Subsection D., of the State Purchasing Act, provides that the Purchasing Agent may "reject any group of bids, but the rejection shall be accompanied by a written statement declaring the reasons for the rejection." Under this subsection, bids may be properly rejected by the State Purchasing Agent, but in the event all bids are not rejected the lowest bid meeting the required plans and specifications, and complying with the rules and regulations of the Purchasing Agent and bonding requisites would be the valid bid. The State Purchasing Agent possesses the authority to determine certain qualifications of bidders under the State Purchasing

Act, and may consider the required bond submitted with such bids. The Purchasing Agent may properly reject any bid submitted by a contractor which is invalid or fails to meet reasonable requirements imposed by the Purchasing Agent, however, the requirements or qualifications imposed by the Purchasing Agent may not be arbitrary or unreasonable in nature.

In answer to your second question, it is our opinion that the provisions of Sections 6-6-1, et seq., N.M.S.A., 1953 Compilation, have definite application to the proposed public works project for the construction of the Ute Dam. Consequently any contract executed in violation of Sections 6-6-1 through 6-6-4, supra, requiring that such contracts be awarded to New Mexico contractors whenever practicable, would be void and of no effect, unless a finding were made and a valid substantiation given as to why such award to a non-New Mexico contractor was not "practicable." Any contract let in violation of the Public Purchasing Act, would render the violator personally responsible under the provisions of Section 6-7-10, N.M.S.A., 1953 Compilation.

In respect to your third question, we conclude that the contract in question must be awarded pursuant to the provisions of the State Purchasing Act and in accordance with the rules and regulations promulgated by the State Purchasing Agent. In arriving at this conclusion, we place strong reliance upon the fact that the State Purchasing Act has specific application to state commissions and public construction contracts. In addition, it is notable that the Interstate Streams Commission is not expressly excluded from the application of such law.

You inquire under your fourth question propounded above, whether under Section 6-7-4, N.M.S.A., 1953 Compilation (P.S.), prequalification may be imposed as a condition preceding the obtaining of plans and specifications and entering a bid on a public works project, or being awarded such bid if low.

Under the system of prequalification of bidders as generally utilized in connection with construction projects, prospective or interested contractors are solicited to submit applications prior to being allowed to bid on proposed projects. A detailed survey is then made as to the experience, dependability, financial qualifications, and other related factors bearing upon such contractor's qualifications. At the conclusion of such investigation, certain of the applicants are then approved for the project and afforded the opportunity to submit bids upon such work.

Generally, the philosophy behind statutory provisions relating to public bidding requires that the bidding opportunities be extended whenever possible. at **43 Am. Jur.**, "Public Works and Contracts," Section 26, at page 768, the rule is stated:

"Since they (statutes relating to public bidding) are based upon public economy and are of great importance to the taxpayers, laws requiring competitive bidding as a condition precedent to the letting of public contracts ought not to be frittered away by exceptions, but, on the contrary, should receive a construction always which will fully, fairly, and reasonably effectuate and advance their true intent and purpose, and which will avoid

the likelihood of their being circumvented, evaded, or defeated. Stern insistence upon positive obedience to such provisions is necessary to maintain the policy which they uphold."

It is our opinion that under the provisions of the State Purchasing Act, no authority is given for prequalification of bidders, and the import of such statutes imply strongly that such may not be legally done. A plain reading of Section 6-7-4 N.M.S.A., 1953 Compilation, indicates that any prospective or interested contractor may be entitled to submit a bid for such construction work. Section 6-7-4, N.M.S.A., 1953 Compilation, Subsection B, states specifically:

**". . . In seeking bids for construction work of any kind, plans and specification relative thereto shall be made available for prospective bidders to enable them to reasonably prepare and submit bids."** (Emphasis supplied).

Our discussion and answer to your fourth question above, makes any consideration of your fifth question unnecessary.

In answer to your sixth question as to whether the refusal to divulge the names of the prequalified contractors and those firms refused prequalification, violates the provisions of Section 71-5-1, et seq., N.M.S.A., 1953 Compilation, after a proper demand has been made, it is our opinion that under the provisions of Section 71-5-1, N.M.S.A., supra, any public records reflecting the work or action of the commission are subject to public inspection.

Section 75-34-21, N.M.S.A., 1953 Compilation, applying to the Interstate Streams Commission, also requires that all papers held by the commission shall be subject to public inspection. This section sets out in part:

". . . All books and papers pertaining to all matters provided for in this act shall at all reasonable times be open to the inspection of any party interested or any citizen of the state."

Under the above, it is apparent that the records and papers of the commission are decreed to be subject to free public inspection at all reasonable times.

In your last question, inquiry is made as to whether the provisions of Section 5-1-5, N.M.S.A., 1953 Compilation, which provides among other things that any construction contract employing the use of state money requires the employment of not less than ninety percent New Mexico residents of each class of labor, has application to the award of the contract contemplated by the Interstate Streams Commission.

Section 5-1-5, N.M.S.A., 1953 Compilation, sets out in full as follows:

"Hereafter all employees of the state of New Mexico, including all political subdivisions thereof and including all of the departments, bureaus, boards, commissions and

institutions in said state, and all of its political subdivisions, shall be residents of the state of New Mexico, having resided in this state for a period of at least one year prior to the commencement of their employment and it shall be the duty of every employer of labor, including the state of New Mexico and all political subdivisions thereof and including all of the departments, bureaus, boards, commissions or institutions, engaged in the construction, erection, alteration, repair or maintenance of any public work with the state of New Mexico, for at least one year previous to the time of employment, to the extent of ninety (90) per centum of the total number of persons of each class of labor so employed, whenever such equally skillful resident labor is available."

Under the above statute it is specifically provided that in construction works for the "Construction, erection, alteration, repair or maintenance of any public work" that state residents will be employed in the number and percentage specified, when such equally skillful resident labor is available. This statute when read together with the provisions of Sections 5-1-7 and 5-1-8, N.M.S.A., 1953 Compilation, would have specific application to the construction of the public works project contemplated by the Interstate Streams Commission, and would have to be considered by the commission in the carrying out of the construction work.