Opinion No. 65-05

January 21, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Mr. Rex Bell, Superintendent, Gadsden Independent School District, Anthony, New Mexico

QUESTION

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At the bid letting for construction of a school building the lowest bid received was from an out-of-state contracting firm. Such low bidder is a partnership licensed under the New Mexico contractors licensing act to do construction work in New Mexico. May the Gadsden Independent School District properly accept the bid submitted by such firm even though they are an out-of-state firm?

CONCLUSION

See Analysis.

OPINION

*{*8}* ANALYSIS

Several statutory provisions bear *{*9}* upon the point of inquiry presented. Section 6-5-4, N.M.S.A., 1953 Compilation, known as the "public purchases act" requires each school district entering into the construction of school facilities whereby materials or labor or both are to be furnished in an amount exceeding the sum of $ 1,000.00 to enter into such contract only after notice has been given that sealed bids will be received for such work. Such notice must conform to the requisites specified in Section 6-5-4, supra. Following the receipt of such bids, the "bid of the lowest responsible bidder" is required to be accepted, unless all bids are rejected. Except where the written approval of the state board of finance is obtained any deviation from the statute results in the contract becoming void.

Under the applicable statutes governing the construction of public works in New Mexico, Section 6-6-1, N.M.S.A., 1953 Compilation sets out:

"Public Building Contracts to be with New Mexico Contractors. -- 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 subdivisions 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."** (Emphasis Supplied)

The statutes pertaining to "public works" define the term "New Mexico contractor" in Section 6-6-2 N.M.S.A., 1953 Compilation, to include "a person or persons who are residents of, and qualified electors in the State of New Mexico, or corporation incorporated under the laws of this state and who maintain their principal office or place of business, and are taxpayers in this state" or "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 years, prior to any contract herein contemplated."**

From the established statutory definition it is evident that the low bidder in question is not in fact a "New Mexico contractor" within the meaning of Section 6-6-1, supra, requiring all public works projects to be let to New Mexico contractors whenever practicable.

Section 6-5-1, N.M.S.A., 1953 Compilation, defines the term "purchaser" to include an independent school district board of education, and Section 6-5-2, N.M.S.A., 1953 Compilation, defines the term "goods" to encompass "all goods, wares, merchandise, materials, supplies, furniture, equipment and every article or thing of whatsoever description purchased for the use or benefit of any purchaser to which this act is applicable." Section 6-5-3 N.M.S.A., 1953 Compilation, directs:

"Purchase from Resident Firms Required -- Exceptions. -- All purchases of goods made by any purchaser to which this act is applicable shall be from manufacturers, distributors or retail establishments having or maintaining in the regular course of business merchandise inventories within the state upon which taxes are paid, provided, however, where no facilities are available for the purchase of any particular goods within the state or where the same may be purchased at a saving of more than 5%, such goods may be purchased outside of the state.

The provisions of this section *{*10}* shall not apply to any purchase in which the United States is interested involving the expenditure of federal funds."

In a prior Attorney General's Opinion, No. 5916, dated March 9, 1954, this office held that Sections 6-5-2 and 6-5-3, supra, have no application to construction contracts and that Sections 6-6-1, et seq. "cover the field insofar as contracts for construction, repair or alteration of public buildings." This opinion was premised upon the fact that the term "goods" covers tangible items only and such term was not intended to cover services rendered by a contractor or items used in building by a contractor. Additionally, under the doctrine of statutory interpretation applied by the courts, where a statute expressly enumerates what is applicable, those items not enumerated are generally deemed

excluded under the doctrine of "expressio unius est exclusio alterius," **State v. Prince,** 52 N.M. 15, 189 P.2d 993.

Having determined that the provisions of Section 6-5-3, supra, relative to the requirement for a 5% preference in the purchase of "goods" is not applicable to construction contracts such as that in question, it is now necessary to determine whether under the "public purchases act" the school district is required to take the lowest responsible bidder which in this case is a non-resident contractor.

Generally, to the extent of any conflict a later enactment governs a prior legislative act. The "public purchases act" (Section 6-5-4, supra) seems to dictate that a school district will let contracts with the "lowest responsible bidder" while the provisions of Section 6-6-1, supra, specify that public building contracts are **"whenever practicable"** to be given only to a New Mexico contractor. However, by another rule of statutory construction a specific statute is deemed to govern over a general statutory provision even though it may have been adopted by the legislature earlier than the general provision. See **Walton v. City of Portales,** 42 N.M. 433, 81 P.2d 58; and **Levers v. Houston,** 49 N.M. 169 P.2d 761.

We think from a careful consideration of Section 6-6-1, supra, pertaining to the requirement that public works contracts will be let to New Mexico firms whenever practicable, such statute is a specific directive which prevails over the more general provisions of the public purchases act (Section 6-5-4, supra). Following such interpretation, it is our opinion that the school district must award the contract for construction of the school building to a New Mexico contractor (defined in Section 6-6-2) unless the school board makes a specific written finding that the award of such contract to a New Mexico contractor is not "practicable."

This office discussed in Attorney General's Opinion No. 62-80, dated June 29, 1962, what is required in respect to the sufficiency of any finding of practicability or non-practicability as required in Section 6-6-1, supra. We there said in part:

". . . it is our opinion that the provisions of Section 6-6-1, et seq., N.M.S.A., 1953 Compilation, have definite application to the proposed public works project . . . 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."

The statute (6-6-1, N.M.S.A., 1953 Comp.) contemplates that the school board must if it does not award the public works contract to a New Mexico contractor make a *{*11}* finding in writing that such is not "practicable." The term "practicable" has been defined by the courts to mean something which is capable of being performed or effected under the prevailing circumstances. **Des Moines Independent School District v.**

Armstrong, 95 N.W. 2d 515, 250 Iowa 634; **People v. Errant,** 82 N.E. 271, 229 Ill. 56; **Miller v. Southern Express Co.,** 83 S.E. 449, 99 S.C. 333.

In making a determination of "practicability" or "non-practicability," the public body involved must necessarily consider the availability of funds, reliability of the contractor, time factors involved in the construction and other aspects incident to such construction project. We believe an express written finding is required in such instance if a New Mexico contractor is not awarded such contract, spelling out the basis for such finding.

We also direct your attention to the provisions of Section 73-1-9, N.M.S.A., 1963 Compilation, wherein it is provided that either the state board of education or the state superintendent of public instruction must approve any contract for the repair or construction of school building of five rooms or less. This section sets out in part:

". . . and no contract shall be written or any money expended by any board of education or governing authority of any school district in this state for the repair or construction of any school building in this state until . . . plans and specifications have been approved by the state board of education or the state superintendent of public instruction. Any contract not so approved shall be absolutely void, and constitute no charge in law or equity against such school board. Provided, however, that this provision shall not apply where the expenditure is a less sum than five hundred dollars ($ 500.00). * * *"

It should also be noted that Section 5-1-5, N.M.S.A., 1953 Compilation, directs that "every employer of labor, engaged in the construction, erection, alteration, repair or maintenance of any public work within the state shall employ persons who have resided in New Mexico, for at least one year previous to the time of employment, to the extent of ninety per cent of the total number of persons of each class of labor employed, whenever equally skillful resident labor is available."

Thus, to recapitulate our answer to your question, we hold that a local public school district by express legislative directive must whenever practicable award a construction contract involving a public school to a New Mexico contractor as defined in Section 6-6-2, supra, or make a written finding setting forth in particularity why such award is not "practicable" under the circumstances.