

Opinion No. 67-118

October 20, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Clay Buchanan Director New Mexico Legislative Council State Capitol Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Does the Conflict of Interest Act, particularly Section 5-12-13, N.M.S.A., 1953 Compilation, (P.S.) thereof, have any application to a business which (1) has no owner or employee who is a legislator or state employee and (2) has no owner or employee providing services on a contractual or retainer basis to the state?
2. Does Section 5-12-13, supra, of the Conflict of Interest Act prohibit a state agency from securing free technical assistance from suppliers in arriving at specifications upon which to base a requisition? That is, if a state agency in the market for a piece of equipment asks suppliers of such equipment for information of a technical nature and, based upon that information writes the specification for the requisition, can the agency accept a bid from a supplier who provided information?
3. Can the agency accept a bid from a supplier if the supplier sends out advertising matter and advertising matter was used to arrive at the specification on the requisition?

CONCLUSION

1. Yes.
2. See Analysis.
3. See Analysis.

OPINION

{*177} ANALYSIS

Section 5-12-13, N.M.S.A., 1953 Compilation, (P.S.) was enacted by the 1967 legislature and provides as follows:

"No state agency shall accept any bid from a person who directly or indirectly participated in the preparation of specifications on which the competitive bidding was held."

It is a fundamental rule of statutory construction that words used in a statute are to be given their ordinary and usual meaning unless a different intent is clearly indicated. **Gonzales v. Oil Chemical and Atomic Workers Inc. U.**, 77 N.M. 61, 68, 419 P. 2d 257 (1966). In **Gonzales**, the Supreme Court pointed out that Webster's Third New International Dictionary defines;

" 'person' both as an individual human being and as a 'body of persons, or a corporation, partnership, or other legal entity that is recognized by law as the subject of rights and duties.'"

The Supreme Court went on to hold that "persons" being inclusive, its meaning includes groups of persons as well as individuals. We therefore conclude that "persons" as used in Section 5-12-13, supra, is comprehensive and embraces all natural and artificial persons. There can be no doubt that the legislature intended to include businesses other than those set forth in question 1, and therefore the answer 1 is yes. "Person" as used in Section 5-12-13, supra, includes any person, corporation, partnership or other legal entity.

Although Section 5-12-13, supra, clearly prohibits state agencies from accepting bids from a person who directly or indirectly participated in the preparation of specifications on which the competitive bidding was held, it is not quite clear what the legislature intended when it enacted this section. During the same 1967 Session of our legislature a new Public Purchases Act was enacted. Section 6-5-21A, N.M.S.A., 1953 Compilation of the Public Purchases Act provides as follows:

"All purchasing for state agencies shall be performed by the state purchasing agent except as otherwise provided in the Public Purchases Act [6-5-17 to 6-5-35]."

The only state agencies that need not purchase through the State Purchasing Agent are the State Fair Commission and the Inter-Tribal Indian Ceremonial Association. Specifications and standards for purchasing must be developed by the State Purchasing Agent in cooperation with the state agencies using the materials or services. The Public Purchases Act created a "state purchasing standards and specifications committee" which is to assist the State Purchasing Agent in the preparation of standards, specifications and acceptable brand lists. This committee is given the authorization to consult with representatives of private industry in preparing specifications. Section 6-5-20, N.M.S.A., 1953 Compilation.

Thus it is seen that for most purchases only one state agency, the State Purchasing Agent, accepts bids. There is an exception to this, however, and that is Section 6-5-25, N.M.S.A., 1953 Compilation, which provides that the state agency accepts the bid on public works projects and not the State Purchasing Agent. Furthermore, it has been pointed out that we have two 1967 enactments by our legislature. The first enactment clearly prohibits vendors from participating in the preparation of specifications. The second enactment clearly anticipates and {*178} authorizes the State Purchasing Agent to consult with members of private enterprise in preparing specifications. If we had only

Section 5-12-13, supra, to consider the answer to questions 2 and 3 would have to be no. However, it is our opinion that the legislature, for a reason, gave the State Purchasing Agent the authority to consult with private industry when preparing specifications. The reason is best pointed out in question 3.

In question 3 we are asked if the agency may accept a bid from a supplier who sends out advertising matter and the advertising matter was used to arrive at the specifications. Obviously, this would be a situation where the bid could be accepted from a person who indirectly participated in the preparation of specifications and thus the person sending such advertising matter to the State Purchasing Agent would be prohibited from bidding. How is the State Purchasing Agent to learn of new products or improved products if those selling those products cannot "sell" the State Purchasing Agent on the value of the products? Certainly for a Purchasing Agent to properly fulfill his function he must learn of all new products and then prepare specifications accordingly. Whatever the legislature intended, we do not believe it intended this result.

As a general rule statutes are to be "construed in the most beneficial way which the language will permit to prevent absurdity, hardship, or injustice. . . ." **State v. Llewellyn**, 23 N.M. 43, 69, 167 Pac. 414 (1917). With this in mind and also considering we have specific authority allowing the State Purchasing Agent to consult with potential bidders, we believe that the legislature by enacting Section 5-12-13, supra, intended to only prohibit a potential bidder from actually preparing specifications which will be used by the State Purchasing Agent. We therefore conclude that if the State Purchasing Agent secures free technical assistance from a supplier in order to aid in preparing specifications, the Conflict of In-Interest Act is not violated. The answer to question 2 is therefore no. Further, it is clear that the Purchasing Agent can prepare specifications taking into consideration advertising matter of potential bidders. We cannot envision any "conflict of interest" arising from such situations. It should be made clear, however, that if a supplier actually participates in the drafting of specifications, that supplier may not participate in any subsequent bidding under those specifications.

By: Gary O'Dowd

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