

Opinion No. 67-133

November 13, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable David F. Cargo Governor, State of New Mexico Santa Fe, New Mexico
Honorable Robert E. Ferguson State Senator P.O. Box 350 Artesia, New Mexico 88201

QUESTION

QUESTIONS

1. Is it a violation of the Conflict of Interest Act for a legislator to participate in bidding on state business through the State Purchasing Agent's office?
2. Is it a violation of the Conflict of Interest Act for a legislator to bid on insurance contracts that the State Purchasing office invites bids on?
3. Does Article IV, Section 28 of the New Mexico Constitution prohibit any legislator from participating in any contract executed pursuant to the Public Purchase Act for the duration of his term of office or one year subsequently?
4. If a violation exists, would it be illegal for the State Purchasing Agent to issue such a contract?
5. If a violation exists, would it be illegal for the appropriate disbursing officer to pay out public funds pursuant to such a contract?
6. Who would be responsible for enforcing the provisions of the Constitution and what procedures for enforcement should be followed?
7. Are public employees who are authorized to execute such contracts or disburse such funds liable for civil action? If so, who may bring suit?

CONCLUSIONS

1. No.
2. No.
3. Yes, but see Analysis.
4. Yes.
5. Yes.

6. See Analysis.

7. See Analysis.

OPINION

{*212} ANALYSIS

This office has been asked by separate opinion requests the legality of a legislator bidding on state contracts. For purposes of clarity, we have slightly reworded some questions on this subject and will answer both requests in this opinion.

The first two questions are directed to the Conflict of Interest Act enacted by the last session of the legislature. The controlling section under this act is Section 5-12-9, N.M.S.A., 1953 Compilation which provides as follows:

"5-12-9. Contracts involving legislators. -- A state agency shall not enter into any contract of purchase with a legislator or with a business in which such legislator has controlling interest, involving services or property in excess of one thousand dollars (\$ 1,000) where the legislator has disclosed his controlling interest, **unless the contract is made after public notice and competitive bidding.** As used in this section contract shall {*213} not mean a 'lease.' " (Emphasis added)

It is fundamental that where a statute is clear and unambiguous, there is no room for construction thereof. It is clear from the above quoted section of the Conflict of Interest Act that a legislator may bid on state contracts, including insurance contracts, if there was public notice of the bid and the bidding was competitive. It is inconceivable that any other opinion could be given under the Conflict of Interest Act.

In the Governor's opinion request we are referred to two other sections of the Conflict of Interest Act, Sections 5-12-10 and 5-12-14, N.M.S.A., 1953 Compilation. Section 5-12-10(B), supra, provides that every legislator who has a controlling interest or a financial interest exceeding ten thousand dollars in a business which is regulated by the state shall disclose such interest. This section in no way prohibits legislators from contracting with the state and we, therefore, do not feel that it is relevant to the questions asked. Section 5-12-14, supra, prescribes the enforcement procedures for the Conflict of Interest Act. Since this section is self-explanatory, we do not believe that a discussion is necessary.

Next we are asked if Article IV, Section 28 of the New Mexico Constitution prohibits any legislator from participating in any contract executed pursuant to the Public Purchases Act for the duration of his term of office or one year subsequently. When construing the language of Article IV, Section 28 of the New Mexico Constitution, a 1934 decision of the New Mexico Supreme Court is controlling. That decision is **State ex rel. Maryland Casualty Co. v. State Highway Commission**, 38 N.M. 482, 35 P.2d 308 (1934). This case involved a suit by the Maryland Casualty Company against the State Highway

Commission to compel payment of a premium on a Workmen's Compensation Insurance Policy. It was claimed by the State Highway Commission that the contract was void under Article IV, Section 28 of the New Mexico Constitution, because a member of the New Mexico House of Representatives was interested in the contract as president and stockholder of Maryland Casualty Company's local agency. The contract entered into was authorized by the Workmen's Compensation Law of 1917 as amended in 1919, 1921 and 1927. The legislator involved had been a member of the legislature for the term 1929-1930. The insurance contract was dated July 1, 1930. The New Mexico Supreme Court held that under Article IV, Section 28 of the New Mexico Constitution, a legislator could have a direct or indirect interest in a contract with the state while a legislator if the law authorizing the contract was not enacted during his term of office. Since the legislator involved had been a member of the 1929-1930 legislature and the amendment authorizing coverage was enacted in 1927, the contract was held valid.

We have made a diligent search, but have been unable to find where the New Mexico Supreme Court has in any way changed the interpretation of Article IV, Section 28 of the New Mexico Constitution as set forth above. This office is, therefore, bound by the interpretation of this constitutional provision as set forth in the decision of the New Mexico Supreme Court in **State ex rel. Maryland Casualty Co. v. State Highway Commission**, supra. In summary, a legislator may not contract with a state agency if the law authorizing that agency to contract was enacted during the term of office of the legislator. Such a legislator, however, is only prohibited from contracting with the state during the term he was elected and for one year thereafter.

Question 3 suggests that the Public Purchases Act is the "law" referred to in Article IV, Section 28. The Public Purchases Act was {214} enacted by the last session of the legislature and prescribes the procedure to be followed by state agencies when purchasing materials and services. If we were to say that the Public Purchases Act is the law authorizing the state to enter into all contracts, as suggested by Question 3, then one year after this term of the legislature Article IV, Section 28 would be a nullity. Future legislatures could enact laws authorizing the state to contract in new areas pursuant to the Public Purchases Act and members of those legislatures could contract during the term of office that these contracts were authorized without violating Article IV, Section 28 of the New Mexico Constitution. If Article IV, Section 28 is to have any meaning at all, such a construction should not be given to this constitutional provision.

In answer to Question 3, Article IV, Section 28 of the New Mexico Constitution does prohibit some legislators from entering into contracts executed pursuant to the Public Purchases Act, i.e., those contracts authorized by laws enacted while the legislator was a member of the New Mexico Legislature. If the contract is an insurance contract, as in the **Maryland Casualty Co.** decision cited above, then we must look to the year that the legislature authorized the state to purchase the particular insurance policy involved, and not to a year in which the legislature may have set forth a procedure to be followed when purchasing insurance. Incidentally, since insurance does not come within the

scope of the Public Purchases Act, the above analysis is not really necessary if we were to limit this opinion to the purchase of insurance.

Based upon the foregoing analysis of Article IV, Section 28 of the New Mexico Constitution, we must conclude that it would be illegal for the state purchasing agent to issue a contract to a legislator who was a member of the state legislature when the law authorizing the contract was enacted. The answers to questions 4 and 5 are, therefore, yes.

Next we are asked by the Governor, who is responsible for enforcing the New Mexico Constitution? Generally, the district attorneys of the various judicial districts and the Attorney General of the State of New Mexico. See **State of New Mexico v. Reese**, N.M. Sup. Ct. No. 8432, issued July 24, 1967, for a discussion of the respective powers of the Attorney General and the district attorneys. In addition, the Governor asks what procedures for enforcement should be followed? Violations of the law should be reported by the Executive Department to the appropriate law enforcement agency.

Last of all, the Governor has asked this office if public employees who are authorized to execute contracts on behalf of the state or disburse public funds are liable for civil action? Then we are asked: "If so, who may bring suit?" We believe that an injunction could be brought against such officials by any person having standing to sue. See the New Mexico Supreme Court's decision in **Asplund v. Hannett**, 31 N.M. 641, 249 Pac. 1074 (1926) for an excellent discussion of who may bring suit against the state. In the absence of "standing to sue", courts of this state may not entertain a suit against the state. See Section 5-12-15, N.M.S.A., 1953 Compilation for standing to sue when there is a violation of the Conflict of Interest Act. This in no way affects the law concerning standing to sue under other laws of this state.

By: Gary O'Dowd

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