

## **Opinion No. 68-94**

September 10, 1968

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Mr. John H. Murphy City Manager P.O. Box 601 Raton. New Mexico

### **QUESTION**

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1. Is a corporation organized in another state but authorized to do business in New Mexico and which pays ad valorem taxes to New Mexico on a stock of materials held for sale in the ordinary course of business entitled to the preference provided for by Section 9, Chapter 72, Laws of 1968?
2. Is a person or organization who resides and has his or its principal office and place of business in another state but has a resident agent and pays ad valorem taxes to New Mexico on a stock of materials held for sale in the ordinary course of business, entitled to the preference provided for by Section 9, Chapter 72, Laws of 1968?

#### **CONCLUSIONS**

1. No.
2. No.

### **OPINION**

#### **{\*147} ANALYSIS**

Chapter 250, Laws of 1967, compiled as Section 6-5-17, et seq., N.M.S.A., 1953 Compilation (P.S.) was repealed by Chapter 72, Laws of 1968, compiled as Section 6-5-18, et seq., N.M.S.A. 1953 Compilation (Temporary Supplement). The 1967 Public Purchases Act, Section 6-5-32, supra, read as follows:

"6-5-32. Resident preference. -- Whenever bids are received from resident suppliers, as defined in the Public Purchases Act, the bid of the resident supplier shall be preferred if his bid does not exceed the bid of a nonresident supplier by a difference of five per cent (5%). This section shall not apply when the purchase involves the expenditure of federal funds."

Section 6-5-32B of the 1968 Act, reads as follows:

"B. In awarding contracts for furnishing materials to a state agency or any local public body, the contract shall be awarded to the bidder who is a resident dealer in preference to any competing bidder who is not a resident dealer, whenever the bid of the competing bidder is five percent or less lower."

Section 6-5-18J of the 1967 Act, defines "resident dealer" as follows:

"Resident supplier' means a person or organization engaged in the business of manufacturing or selling tangible personal property or services in the state **who has filed a New Mexico income tax return or who has paid ad valorem taxes on business property in this state;**" (Emphasis added).

Section 6-5-32B of the 1968 Act defines "resident dealer" as follows:

"For the purpose of this subsection, 'resident dealer' means a person or organization engaging in the business of selling tangible personal property in the state, **who is a resident of the state** and who has paid ad valorem taxes on a stock of materials held for sale in the ordinary course of business which stock is of the general type offered and which stock is reasonably sufficient in quantity to meet the ordinary requirements of customers."

The word change of "supplier" and "dealer" in the present section appears to have no significance insofar as the present question is concerned. There are, however, other areas of change in the definition of those entitled to the "resident" preference. For example under the repealed section one could qualify by either filing a resident income tax return or by paying ad valorem taxes on business property in this state. Under the present act the filing of a resident income tax return is insufficient *{\*148}* and an ad valorem tax must be paid on a stock of materials held for sale in the ordinary course of business, which stock is of the general type offered and in a quantity reasonably sufficient to meet the ordinary requirements of customers. **For the purposes of this opinion it is assumed that the bidders qualify under the above example of changed requirements.** There is, however, an additional requirement under the present act which does appear to be pertinent under the facts presented. The present act also added the language "who is a resident of the state" to the definition contained in the prior statute of those entitled to a "resident" preference.

The word "resident" as used in the statute requires construction. It is often construed as synonymous with "domiciled" but may have a different meaning under varying circumstances. Construction is necessary because of the addition of the above quoted language in the statute replacing one which did not contain such language and because of the inherent ambiguity of the word "resident."

It is presumed that the legislature did ascribe meaning to the phrase being considered and did not perform a useless act. **Alvarez v. Board of Trustees of La Union**, 62 N.M. 319, 309 P. 26 989.

In 1967 and prior to the adoption of the present Public Purchases Act the legislature enacted the Business Corporation Act compiled as Sections 51-24-1 through 51-31-11, N.M.S.A., 1953 Compilation (P.S.). This Act throughout distinguishes between domestic corporations and foreign corporations (one organized under laws other than those of this state).

**Oleck Modern Corporation Laws**, page 705, Section 461 states:

"The terms **domicile**, **residence** and **citizen** have been productive of much confusion in regard to corporations, especially as found in statutes. It is generally settled that domicile means the state in which incorporation was had, for a corporation."

For most purposes, insofar as corporations are concerned the three terms appear to be used interchangeably. This is particularly true where the exercise of a privilege is concerned, or the granting of a franchise. **Brown v. Brown**, 150 Tenn. 89, 261 S.W. 959. We are here concerned with the granting of a privilege and no authority found, would, under the facts here present, indicate otherwise.

In **Food Machinery and Chemical Corporation v. Marquez, et al.**, 139 F. Supp. 421 (Dist. of New Mex.) the Court held that the place of organization of a corporation was its place of residence.

The conclusion that the legislature intended such a meaning to the phrase under consideration seems clear. Under prior law a corporation could qualify for the preference whether or not a foreign corporation. The restriction, to be meaningful must be applicable to foreign corporations so as to remove such right to a preference from them and to grant it only to corporations organized under the laws of this state.

The answer to your first question is in the negative.

The answer to your second question is likewise negative. Under the stated facts the individual or owner actually conducting the business is neither domiciled in this state nor a resident of this state. The fact that the agent is a resident of this state does not bring the operator of the business within the definition of those entitled to the preference.

By: James V. Noble

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