Opinion No. 69-19

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BY: OPINION OF JAMES A. MALONEY, Attorney General Gary O'Dowd, Deputy Attorney General

TO: Mr. Harry Wugalter, Chief, Public School Finance Division, Dept. of Finance and Administration, Legislative-Executive Building, Santa Fe, N.M. 87501

QUESTIONS

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1. Are school districts governed by Section 5-12-13, N.M.S.A., 1953 Compilation, of the Conflict of Interest Act?

2. May an insurance agent or company participate directly in preparing bid specifications for school insurance contracts and be an eligible bidder?

3. Is it in violation of the purpose and spirit of the Public Purchasing Act to restrict eligible bidders to insurance agents or companies within the school district and/or county when preparing insurance bid specifications?

4. May a local Board of Education restrict insurance bidders to agents who have been licensed for a reasonable number of years and who have maintained an office within the school district for that time? If so, would five years be reasonable?

5. What would constitute a reasonable proof that the lowest insurance bidder would not be in a position to perform the services expected of the local Board of Education on insurance matters?

CONCLUSIONS

1. No.

2. See analysis.

3. See analysis.

4. See analysis.

5. See analysis.

OPINION

*{*27}* ANALYSIS

Section 5-12-13, N.M.S.A., 1953 Compilation of the Conflict of Interest Act provides as follows:

"No **state agency** shall accept any bid from a person who directly or indirectly participated in the preparation of specification on which the competitive bidding was held." (Emphasis added.)

The purpose of statutory construction is to determine legislative intent. It is a fundamental rule of statutory construction that in order to determine the true intention of the legislature one must not look to particular statutory clauses and phrases within an Act, but rather the whole statute must be considered to determine their meaning. See **Reese v. Dempsey,** *{*28}* 48 N.M. 417, 152 P.2d 157 (1944) and **State v. Thompson,** 260 P.2d 370, 57 N.M. 459 (1953). Thus, although a school district may technically be classified as a "state agency" for some purpose, when one considers the whole Conflict of Interest Act, it is clear that the legislature did not intend that such a broad interpretation be given "state agency" for purposes of the Act. Before looking at the provisions of the Conflict of Interest Act, however, it should be pointed out that in recent years the legislature has enacted a number of laws which clearly distinguish between a "state agency" and "local public bodies" of this state.

For instance in the Public Purchases Act we find that "state agency" is defined as follows:

"'State agency' means any department, institution, board, bureau, court, commission, district or committee of the government of the state, and means every office or officer of any of the above."

"Local public body", on the other hand, for purposes of the Public Purchases Act

"means every political subdivision of the state created under either general or special acts, which receives or expands public money from whatever source derived, including but not limited to counties, county institutions, boards, bureaus or commissions, incorporated cities, towns or villages, drainage, conservancy, irrigation or other districts, **school,** junior college, or vocational technical institutes districts, and every office or officer of any of the above." (Emphasis added.) See Section 6-5-18 A and B, N.M.S.A., 1953 Compilation (Laws of 1967)

The same distinction between state agencies and political subdivisions of this state was made in the Legislative Audit Act. See Section 4-24-2 A and B, N.M.S.A., 1953 Compilation (Laws, 1965).

Looking to the provisions of the Conflict of Interest Act, we see that Section 5-12-7 prohibits a "state agency" from entering into a contract, other than an employment contract, with an "employee" of the agency unless the contract is made after public

bidding. Section 5-12-8 of the Conflict of Interest Act prevents state agencies from entering into contracts in excess of $ 1000 with a person who has been an employee" of the state agency within the preceding year. If either of these provisions is to have any effect on school districts, the term "employee" must include employees of the school districts. An "employee" is defined in the Conflict of Interest Act as

"any person who has been elected to, appointed to or hired for any **state office** and who receives compensation in the form of salary, but excluding legislators and judges." (Emphasis added.) See Section 5-12-2, N.M.S.A., 1953 Compilation.

It is clear that employees of school districts do not hold a "state office." See **State ex rel Ulrick v. Sanchez,** 32 N.M. 265, 255 Pac. 1077 (1927). This it must be concluded that the Conflict of Interest Act does not apply to employees of school districts or other similar political subdivisions of this state.

This conclusion is further supported by Sections 5-12-11, 5-12-14 and 5-12-15 of the Conflict of Interest Act. Section 5-12-11 provides that the head of every executive agency or institution shall draft a code of conduct for all employees of the agency or institution. Again, school districts do not come within this provision of the Conflict of Interest Act. Sections 5-12-14 and 5-12-15, supra, provide for the enforcement of the provisions of the Conflict of Interest Act. Under Section 5-12-14 B, it is grounds for dismissal, *{*29}* demotion or suspension if an "employee" as defined in the Conflict of Interest Act, violates any of its provisions. Since "employee" was used in the Conflict of Interest Act does not include employees of school districts there would be no adequate method of enforcing the provisions of the Conflict of Interest Act if it were construed to apply to school districts. Looking at the whole of the Conflict of Interest Act, we must therefore conclude that "state agency" as used in the Conflict of Interest Act does not apply to school districts.

Last of all we note that the same legislature that enacted the Conflict of Interest Act also enacted the Public School Code which has its own Conflict of Interest provisions. See Section 77-19-1, N.M.S.A., 1953 Compilation. It would not have been necessary to enact Section 77-19-1, of the Public School Code if the Conflict of Interest Act applied to school districts.

Next we are asked if an insurance agent or company that has directly participated in the preparation of insurance bid specifications of a school district may be an eligible bidder. While the Public School Code does have a conflict of interest provision, this provision does not prohibit school districts from seeking the assistance of bidders in the preparation of specifications. See Section 77-19-1, N.M.S.A., 1953 Compilation. Although, we can find nothing prohibiting prospective bidders from assisting in the drafting of specifications, we wish to emphasize that specifications of school districts must be drafted in such a manner so as not to eliminate any responsible bidder from being awarded the contract. It is the duty of the school district's central purchasing office to see that all specifications are fairly drafted. We also should point out that specifications are available from sources other than insurance agents and companies.

Whenever possible these specifications should be used by those local governmental bodies not governed by the Conflict of Interest Act.

In your third question, we are asked if it is a violation of the Public Purchases Act to restrict eligible bidders to those located in the school district. Under the provisions of the Public Purchases Act, a school district need only award a contract to the lowest responsible bidder. "Responsible bidder" is defined in the Public Purchases Act as

"a bidder who submits a **responsible bid,** and who has furnished when required, information and data to prove that his financial resources, production or **service facilities, service reputation and experience are adequate** to make satisfactory delivery of the materials or services on which he bids. * * *" (Emphasis added.) Section 6-5-18 I, N.M.S.A., 1953 Compilation.

A "responsible bid" is

"a written offer to furnish materials or services in conformity with standards, specifications, delivery terms and conditions, and other requirements established by the user or central purchasing office." Section 6-5-18 H, N.M.S.A., 1953 Compilation.

Certainly in some school districts of this state it would be reasonable to require bidders to maintain an office within the district. Bidders too remotely located from the school district perhaps could not furnish adequate service to the school district. We must caution however that what may be reasonable for one school district may not be reasonable for another.

In answer to your fourth question, we believe that the length of time an insurance agency has been located within the school district may be considered by the school district in determining whether the service, reputation *{*30}* and experience of an agent are adequate. Under some situations, five years may be arbitrary and unreasonable; while in other situations, looking at the particular bidder, such a qualification may be reasonable. It is the duty of the central purchasing office to determine what is reasonable under the circumstances. If the central purchasing office of the school district believes that a bidder is not a "responsible bidder" because he has not maintained an office in the district for a reasonable period of time, the burden is on the bidder to prove that his service facilities, service reputation and experience are adequate to make satisfactory delivery of the services required. Section 6-5-18 I, supra.

Your last question has already been answered, Section 6-5-18 I, sets forth what information may be required of a bidder. It is the duty of the purchasing agent of each school district to determine what proof is reasonable to require under the circumstances. The Public Purchases Act gives school districts a certain amount of "home-rule" in purchasing. This freedom carries commensurate responsibilities.