

Opinion No. 69-135

November 24, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Mark B. Thompson III,
Assistant Attorney General

TO: Mr. Morris Stagner, District Attorney, Ninth Judicial District, Clovis, New Mexico

QUESTIONS

FACTS

A Board of County Commissioners desires to appoint a local insurance agency as an exclusive agent for the life, accident, sickness and hospital benefits for the employees of the county. The duties of the exclusive agent would be to (1) conduct the survey of the needs of the employees for insurance coverage; (2) prepare specifications to be submitted in invitations to bid to the insurance companies; (3) take care of all mechanical work in the bidding process; (4) recommend to a county commission which bid should be accepted; (5) service the policy of the successful bidder as if it were the agent of the bidder and receive the commission for such work from the successful insurance company.

QUESTIONS

Would the appointment of an exclusive agent for the above purposes by a county commission violate the Conflict of Interest Act or the Public Purchases Act?

CONCLUSION

The appointment of an insurance agent as an exclusive agent for the purposes outlined above would be a violation of the Public Purchases Act.

OPINION

{*219} ANALYSIS

The only provision in the Conflict of Interest Act which might have some application to this problem is Section 5-12-13, N.M.S.A., 1953 Compilation, 1969 Supp., which 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."

Since the exclusive agent would not actually bid on the insurance in this case it appears 5-12-13 would not be violated in this instance. Furthermore, the Conflict of Interest Act applies only to state agencies and that term would not include a county commission. See, **Ward v. Romero**, 17 N.M. 88, 97, 125 P. 617 (1912). See also, Opinion of the Attorney General No. 69-19, dated March 12, 1969, where it was held that a school district was not a state agency within the terms of the Conflict of Interest Act.

The Public Purchases Act does apply to the County Commission since it is included in the definition of a local public body under that act. See, § 6-5-18 P, N.M.S.A., 1953 Compilation, 1969 Supp. All purchasing for a local public body must be performed by a central purchasing office designated by the governing authority of the local public body, with certain exceptions. § 6-5-21 B, N.M.S.A., 1953 Compilation, 1969 Supp. The exceptions to purchasing through a central purchasing office do not apply to the instant problem. See, § 6-5-22 B, N.M.S.A., 1953 Compilation, 1969 Supp.

If the arrangement between the insurance agent and the central purchasing office of the local public body were one in which the agency would provide technical assistance to the central purchasing office, we believe the contract with the insurance agency would be exempt from the Public Purchasing Act. See Section 5-6-34 B, N.M.S.A., 1953 Compilation 1969 Supp. The technical or professional service which the agency would provide, for a fee, would be in the nature of conducting a survey to establish the needs of the employees of the local public body and preparing the specifications for the insurance contracts. See also, Opinion of the Attorney General No. 67-118, issued October 20, 1967.

It would appear that the proposal by the insurance agency is not merely one for a contract for technical or professional services with the central purchasing office of the local public body. Instead, the proposal contemplates that the local public body would turn over the entire purchasing process to the insurance agency, which would not receive any compensation from the local public body for its services, but would look to the successful bidder on the insurance contract for compensation. The insurance agency would clearly have its own interest to look after in recommending an insurance company to the local public body since it would receive its compensation {220} from the successful bidder.

It is true that under the general law of agency the local public body could agree to allow its agent to work for the agent's benefit as well as that of the local public body. See generally, Restatement (Second) of Agency § 387 (1957). But under the Public Purchases Act the local public body has no authority to delegate the performance of purchasing to someone other than the central purchasing office. Section 6-5-21 B, states quite clearly that the purchasing shall be performed by a central purchasing office. See also, Opinion of the Attorney General No. 69-87, dated August 4, 1969, wherein it was held that the State Purchasing Agent could not delegate his authority to state agency procurement officers.