Opinion No. 69-92

August 6, 1969

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

TO: Mr. L. W. Hyatt, Purchasing Agent, New Mexico Military Institute, Roswell, New Mexico 88201

QUESTIONS

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1. Does a long-term lease of office equipment by the purchasing agent of the New Mexico Military Institute without solicitation or acceptance of bids violate the Public Purchases Act?

2. Does the illegality of the contract provide an effective cause defense for termination of the contract by the state?

CONCLUSIONS

1. Yes.

2. Yes.

OPINION

*{*145}* ANALYSIS

The first question asks whether the lease agreement entered into by the purchasing agent of the New Mexico Military Institute violates the Public Purchases Act (Sections 6-5-17 to 6-5-35, N.M.S.A., 1953 (1968 Interim Supp.)). It is our opinion that it does. Section 6-5-31, N.M.S.A., 1953 (1968 Interim Supp.), provides as follows:

"Any lease agreement for personal property of one thousand dollars ($ 1000) or more annually shall be subject to the provisions of the Public Purchases Act [6-5-17 to 6-5-35], except the lease of personal property in those instances where the property is designated to match other property in use, by the user or where uniques or novel product application is required to be used in the public interest, which shall include but not be limited to the leasing of computers."

The agreement entered into with a Credit Corporation called for payment of rents exceeding $ 1000 per year. Without any other information we must assume that the property leased is not designated to match other property in use and is not a unique or

novel product application required to be used in the public interest as would come within the exemption from the Public Purchases Act for certain lease agreements. The Public Purchases Act provides that a contract executed in behalf of a state institution, be made through the central purchasing agent for that institution, as was done here, and that the contract be advertised and submitted for public bid and that it be awarded to the lowest responsible bidder. In this case evidently bids were neither solicited nor received. The requirement of the statute is clear. Therefore, we must conclude that the contract violates the Public Purchases Act.

The second question asks whether the contract may be terminated. It is our opinion that it may. The contract calls for a lease of the machines for a period of five years and for the payment of rentals every month. There is no provision in the lease agreement for an earlier termination of the contract than at the end of the five-year term. Therefore, any authorization for such a premature termination of the agreement must be by operation of law. As a general rule:

"[s]tatutory and constitutional provisions requiring that state contracts be let to the lowest responsible bidder pursuant to public competitive bidding, as well as provisions *{*146}* requiring that reasonable efforts be made to secure competitive bids, are **mandatory** and a contract not so let **does not bind the state."** C.J.S. States, sec. 116 (Emphasis added).

See also, **Pittman Const. Co. v. Housing Authority of Opelousas,** 167 F. Supp. 517 (W.D. La. 1958), affd., 264 F.2d 695 (5th Cir. 1959); **Kimbrell v. State,** 272 Ala. 419, 132 So.2d 132 (1961); **Columbus Blank Book v. Maloon,** 116 Ohio App. 393, 188 N.E.2d 431 (1963); Miller v. State, 73 Wash. 790, 440 P.2d 840 (1968).

Concluding that the contract does not bind the state, it must now be considered whether the state may be **estopped from asserting** the illegality as a defense to enforcement of the contract by reason of its acts in entering the contract.

"[T]he doctrine of estoppel will not be applied to deprive the government of the due exercise of its police power, or to affect public revenues or property rights, **or to frustrate the purpose of its laws or thwart its public policy."** C.J.S. Estoppel, sec. 140 (b) (Emphasis added).

Nor are unauthorized acts grounds for estoppel where the act relates to the performance of a public duty. See **Ross v. Daniel,** 53 N.M. 70, 201 P.2d 993 (1949).

If a party contracting with a state or agency thereof were allowed to compel performance of a contract executed in contravention of state laws using estoppel as a basis, the purpose of the Public Purchases Act and all other similar restraints on the power of an officer or agency to bind the state would be effectively defeated. To prevent this, the rule has evolved that:

"persons dealing with the public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril." Nello L. Teer Co. v. North Carolina State Hy. Comm., 265 N.C. 1, 10, 143 S.E. 2d 247, 254 (1965).

There are no compelling equitable considerations which would justify disregarding this rule here. The lease provides for monthly rental payments and, therefore, any services received by the state by virtue of the contract have been fully paid for.