

Opinion No. 70-26

March 11, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Wm. F. Brainerd Mayor City of Roswell P.O. Drawer 1838 Roswell, N.M. 88201

QUESTIONS

FACTS

The City of Roswell and County of Chaves entered into a contract with a funeral home which provided that the funeral home would be paid \$ 1,200.00 per month for conducting an ambulance service in the City and County. It is acknowledged in the contract that the ambulance service would also charge its customers for any service performed. At the time of the execution of the contract an ambulance service holding a certificate of convenience was operating in the city and county and another funeral home was operating in part of the county, with "power" to operate in the city and county.

QUESTIONS

Is the contract with the funeral home legal?

CONCLUSION

See analysis.

OPINION

{*45} ANALYSIS

Article Nine, Section Fourteen of the New Mexico Constitution generally prohibits all levels of government from "aiding" private enterprise. See generally, Opinion of the Attorney General, No. 70-23, dated February 17, 1970. This constitutional provision also contains a proviso that "nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons." How does this constitutional provision apply to the ambulance service problem?

In the first place, it appears that the Legislature has attempted to solve part of the problem of counties and municipalities with regard to ambulance services by the passage of Section 12-15-1, N.M.S.A., 1953 Compilation. In the absence of an established ambulance service the county and municipality may create a public ambulance service to perform the duties normally handled by private ambulance services. The statute allows the public body to either run the ambulance service with its

own employees and equipment or contract with an operator who would provide employees and equipment. In the latter situation, the operation would still be a public ambulance service. It is also interesting to note that this public ambulance service could provide service to paying customers, and would charge the tariff rates as established by the New Mexico State Corporation Commission.

Assuming that there are established ambulance services in the area under the jurisdiction of the county and municipality, the public bodies might become involved in the ambulance service problem in the event that sick and indigent persons were not being cared for by the existing ambulance services. See Opinion of the Attorney General, No. 65-41, dated March 5, 1965.

It is our opinion that in this second situation the public involvement would take the form of payments to an ambulance service for the specific purpose of hauling indigent persons, whether dead or alive. We do not believe that there has to be "technical" consideration for the payment to the ambulance service under Article Nine, Section Fourteen of the Constitution. We can find no case or Attorney General Opinion which holds that consideration must flow to the public body in return for its making provision for the care and maintenance of sick and indigent persons. Compare, **Village of Deming v. Hosdreg Co.**, 62 N.M. 18, 303 P.2d 920 (1956); **State ex rel. Mechem v. Hannah**, 63 N.M. 110, 314 P.2d 714 (1957); Opinion of the Attorney General, No. 67-29, dated February 16, 1967.

In the event that the public bodies sought to contract with an existing ambulance service to make provision for the care and maintenance of sick and indigent persons, or even if the local governments leased the operation of the public ambulance service, the transactions would obviously have to comply with the Public Purchases Act. The Public Purchases Act would apply even if the service was considered to be a technical and professional service, because the central purchasing agent of the local public body is required to prescribe by rule or regulation that ambulance services are exempt from the Public Purchases Act. Section 6-5-34 (B), N.M.S.A., 1953 Comp. (1969 Supp.)

In connection with the bidding by established ambulance services for the contract to haul indigents, we have noted some confusion due to the existence of two types of ambulance services. Funeral homes may apparently operate a full scale ambulance service, unregulated by the State Corporation Commission, and would not be bound by any tariff requirements in bidding. § 64-27-25 (C.), N.M.S.A., 1953 Comp.; § 67-20-5 A. (4), N.M.S.A., 1953 Comp.; Opinion of the Attorney General, No. 67-85, dated June 28, 1967. **But see**, Opinion of the Attorney General, No. 5199, dated March 1, 1949; N.M. Const. Art. 11, § 7; **Thompson v. Legislative Audit Comm'n**, 79 N.M. 693, 448 P.2d 799 (1968). See also, § 64-27-15, N.M.S.A., 1953 Comp. (1969 Supp.).

It would also appear that a common carrier, regulated by tariffs filed with the State Corporation Commission, could submit a proposed rate lower than the rate charged to the general public under the tariffs. See Opinion of the Attorney General, No. 67-40,

dated March 10, 1967. But such special rates would have to be filed with the State Corporation Commission to be effective. § 64-27-7, N.M.S.A., 1953 Comp.

In analyzing the contract submitted to us by your letter of January 30, 1970, we find that it appears to be defective under our analysis of the law outlined above. Under the facts you have given in your letter, it is clear that this could not be a contract for the operation of a city-county ambulance service under Section 12-15-1, because of the existence of established ambulance services. Secondly, this contract does not appear to provide merely for the care of sick and indigent persons who are not being cared for by ambulance services, but instead provides a subsidy to a private concern in consideration for that concern's entering into the ambulance service business.

For example, Paragraph Eight of the contract specifically allows the ambulance service to charge the persons for whom the service is rendered. This is obviously inconsistent with a contract providing payment to the ambulance service for performing a service for persons who are not otherwise able to pay. See Opinion of the Attorney General, No. 65-41, **supra**. We have been submitted no facts concerning public bidding or the existence of any applicable rule or regulation by the central purchasing agency of the local public bodies and we offer no opinion as to whether the contract is legal under the Public Purchases Act.

In conclusion, we feel an obligation to comment on the effect of this opinion. We are not required to issue opinions to persons other than those enumerated in Section 4-3-2 D., N.M.S.A., 1953 Comp. (1969 Supp.). We may however issue advisory opinions which, as in this instance, deal with a subject of statewide interest, even though the recipient is not bound by the opinion. In this case, the only legal advice which may be relied upon for further action is that of the district attorney representing the county and the city attorney.

By: Mark B. Thompson, III

Assistant Attorney General