

## Opinion No. 75-18

March 3, 1975

**BY:** OPINION OF TONEY ANAYA, Attorney General

**TO:** Honorable Robert M. Doughty, II District Attorney 12th Judicial District P. O. Box 808 Alamogordo, New Mexico 88310

### QUESTIONS

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Must a county request bids from public contractors for the construction of a rural county fire station, or, in the alternative, may the county act as its own prime contractor by purchasing all necessary materials, using county employees or other hired labor and subcontracting the plumbing and electrical installations?

#### CONCLUSION

See Analysis.

### OPINION

#### {\*62} ANALYSIS

To answer your question, it is necessary to resort to rules of statutory construction to resolve an apparent conflict between Section 6-5-25, NMSA, 1953 Comp. (2nd Repl. Vol.) and Section 15-46-1, NMSA, 1953 Comp. Section 6-5-25, **supra**, specifies:

"Awards and the execution of contracts for the construction and alteration of major public works, including but not limited to roads, bridges, airports, buildings and dams, shall be made by {\*63} the governing authority of the user. The central purchasing office shall be responsible for giving notice to prospective bidders pursuant to section 10 of the Public Purchasers Act [6-5-26]."

Section 15-46-1 states:

"When any public work is to be done by order of the board of county commissioners of any county of this state it is to be paid out of county funds, and if said expenditure is authorized by law and exceeds the amount of three hundred dollars [\$ 300], said board of county commissioners is hereby required to advertise the said work for at least twenty [20] days in some newspaper published in the county wherein the work is to be done, before the letting of the said work, and if no newspaper is published in the county, to post notices in at least ten [10] conspicuous places for bids for such work, and let the same to the lowest responsible bidder, which bidder shall be required to enter into good

and sufficient bonds for double the amount of the contract price, for the faithful performance of said contract."

Section 6-5-25, **supra**, is a **general** statutory provision since it gives the authority to state agencies and all local public bodies, as defined in Section 6-5-18, NMSA, 1953 Comp. (2nd Repl. Vol.), to award contracts for public works projects. However, Section 15-46-1, **supra**, is a **specific** statute, referring specifically to what **counties** must do if they plan to award contracts for public works. Here, we have conflicting general and specific statutory provisions which can be applied to county public work projects. "Where such a conflict exists, the specific statute is given effect because it is considered an exception or qualification of the general statute." **Hopper v. Board of County Comm'rs**, 84 N.M. 604, 506 P.2d 384 (Ct. App. 1973); **State v. Lujan**, 76 N.M. 111, 412 P.2d 405 (S. Ct. 1966). Therefore, Section 15-46-1, **supra**, is the applicable statute.

With this in mind, we now turn to your initial question. This issue has been answered by several courts in other jurisdictions. The case of **Montana Chap., Nat'l Elec. Con. Ass'n v. State Bd. of Educ.**, 137 Mont. 382, 352 P.2d 258 (S. Ct. Mont. 1960) is worth quoting from since it directly pertains to the question at hand. The court was asked whether Section 82-1131, R.C.M. 1947 of the Montana laws prevented the State Board of Education from employing students to build and repair facilities at state educational institutions. Section 82-1131, R.C.M. 1947, provides:

"It shall be unlawful for the Board of Examiners or any offices, departments, institutions, or any agent of the State of Montana acting for or in behalf of said state to let any contract for the construction of buildings or the alteration, repair and improvements of buildings and grounds on behalf of and for the benefit of the state wherein the amounts involved is five hundred dollars (\$ 500) or more without first advertising . . ."

The Montana Supreme Court said:

"In our view, the words of section 82-1131 are plain, direct, unambiguous and certain. It simply means that **it is unlawful to let a contract** for the construction, repair or improvement of public buildings where the **{\*64}** cost **exceeds \$ 500 without first advertising** in two newspapers for at least three consecutive weeks and calling for bids. The statute deals with the **procedure** to be followed **when** and **if** a contract is to be awarded. It does not set forth the instances when a contract must be let, nor does it prohibit state officers and employees from performing work on state buildings. If the Legislature had intended this statute to be a general statute requiring that all construction, repair or improvement of state properties be done only "by contract" let to the lowest responsible bidder, such could have been spelled out expressly in plain language."

See also **Jibben v. City of Sioux Falls**, 79 S.D. 143, 109 N.W.2d 252 (S. Ct. S.D. 1961); **Inskip v. Board of Trustees of Univ. Illinois**, 26 Ill. 2d 501, 187 N.E.2d 201 (S. Ct. Ill 1962), **Davis v. Carbon County**, 369 Pa. 322, 85 A. 2d 862 (S. Ct. Penn. 1952),

64 Am. Jur. 2d **Public Works and Contracts**, § 40, Opinion of the New Mexico Attorney General, 71-55, issued April 16, 1971.

These cases as well as others establish that only where the statute expressly prohibits the work from being done other than by contract let by competitive bid, or expressly requires the work to be let on contract, is the public agency prohibited from doing the work with its own employees. Section 15-46-1, **supra**, although requiring the county to advertise for all public work projects, does not expressly prohibit the work from being done other than by contract let by competitive bidding. We are of the opinion that it was the intent of the Legislature that only if a county plans **to let the work by contract** must the county advertise for bids pursuant to Section 15-46-1, **supra**.

If, however, the county should decide to build public work projects with its own employees, then the county is required to buy all necessary materials to be used in the project through competitive bidding. This is required since pertinent provisions, other than Section 6-5-25, **supra**, of the Public Purchases Act govern the purchase of materials by a county. See subsections 6-5-18(B), (F), and (J), NMSA, 1953 Comp. (2nd Repl. Vol.); Section 6-5-21 (B), NMSA, 1953 Comp. (2nd Repl. Vol.); and Section 6-5-26, NMSA, 1953 Comp. (2nd Repl. Vol.). Therefore, when a county employs its own employees to build county buildings, it is required to comply with the pertinent provisions of the Public Purchases Act with respect to the purchase of materials to be used by the county. **Tibben v. City of Sioux Falls, supra; Inskip v. Board of Trustees of Univ. Ill., supra.**

We should also mention that if the county uses county employees for building public work projects then the construction is subject to the State Building Code Standards. See subsections 67-35-52(F) and (G), NMSA, 1953 Comp. (2nd Repl. Vol.).

By: Louis Druxman

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