

September 08, 2005 Subcontractor Bonding in the Context of Separately Bid Components

Honorable Leonard Lee Rawson
State Senator
P.O. Box 996
Las Cruces, NM 88004

Re: Opinion Request--Subcontractor Bonding in the Context of Separately Bid Components

Dear Senator Rawson:

You ask this question:

Is a subcontractor required to provide a performance and payment bond under Senate Bill 814, which is 2005 N.M. Laws, Ch. 99, if the subcontractor proposes and the contractor accepts separate bids for different components of a particular job--for example, a bid on materials and a separate bid on labor, or separate bids for different floors or wings of a project--that together total \$50,000 or more but separately do not, and each separately bid component is contingent upon acceptance of all the other components offered by the same subcontractor?

Our answer is: Yes. The subcontractor's separately bid components together comprise a package, which is offered by that subcontractor only as a package. That package bid equals or exceeds \$50,000. Hence, the bonding requirement imposed by 2005 N.M. Laws, Ch. 99 applies.

Discussion.

Senate Bill 814, now 2005 N.M. Laws, Ch. 99, (hereinafter "Chapter 99"), enacts a new section of the Procurement Code:

BONDING OF SUBCONTRACTORS: A subcontractor shall provide a performance and payment bond on a public works building project if the subcontractor's contract for work to be performed on a project is fifty thousand dollars (\$50,000) or more.

Given that Chapter 99 is a new section of the Procurement Code, that Code's prohibition against "artificial division," for purposes of exempting small purchases from competitive procurement requirements, is instructive.

NMSA 1978, § 13-1-125 (D) (2005) provides: "Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section."¹ See also NMSA 1978, § 6-24-19 (D) (1995): "Procurements [made by the New Mexico lottery authority] shall not be artificially divided to reduce the cost of the procurement below the

major procurement threshold." "Artificial" has been defined as "contrived or affected." Concise Oxford English Dictionary 76 (10th ed., revised, 2002).

The 1979 Model Procurement Code for State and Local Governments, at § 3-204, pertaining to small purchases, provides, in part: "[P]rocurement requirements shall not be artificially divided so as to constitute a small purchase....". The commentary to this section states, in part: "Care must be taken to ensure that purchase requirements are not fragmented in order to fall within the authority contained in this Section, thus circumventing the source selection procedures required by either Section 3-202 (Competitive Sealed Bidding), or Section 3-203 (Competitive Sealed Proposals)."

10 Eugene McQuillin *The Law of Municipal Corporations* § 29.33, at 389 (3d ed., rev. vol. 1999) states: "Where a municipality is prohibited from letting contracts involving an expenditure of more than a specified sum without submitting the same to competitive bidding, it cannot divide the work and let it under several contracts, the amount of each falling below the amount required for competitive bidding."

64 Am Jur2d PUBLIC WORKS AND CONTRACTS § 41 (2001) states: "In determining whether a particular contract is sufficiently large to come within the amount specified in a statute as requiring competitive bids, a question frequently arises as to whether the work involved must be regarded as included in one contract or whether it may be split up into several smaller contracts, each of which will be under the minimum requirement of the statute. When it is apparent that the work has been split up for the purpose of evading the statute, the courts have said the contracts are invalid."

The evident purpose of § 13-1-125 is to prevent an illegal circumvention or avoidance of the statutory competitive bidding requirements by fragmenting purchase requirements. While the Procurement Code's "artificial division" prohibition is directed to the small purchase exception to competitive bidding, the policy underlying that prohibition applies also to Chapter 99, in the context of the question presented. The policy implications of the various constructions of ambiguous statutes may be considered. See *State v. Rivera*, 2004-NMSC-001, ¶ 14, 134 N.M. 768, 82 P.3d 939. That legislative policy of disallowing "fragmenting" logically would apply, in the context of Chapter 99, to a subcontractor's package bid of various separately bid components that are offered with a contingency that requires acceptance of the whole lot. That legislative policy counsels in favor of construing Chapter 99 in a manner that secures the benefits of Chapter 99 and avoids circumvention of its requirements.

The primary goal in interpreting a statute is to give effect to the Legislature's intent. *State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. "Statutes are to be read in a way that facilitates their operation and the achievement of their goals." *Miller v. N.M. Dep't of Transp.*, 106 N.M. 253, 255, 741 P.2d 1374, 1376 (1987). "Our interpretation of statutes must be consistent with legislative intent, and our construction must not render a statute's application absurd, unreasonable, or unjust." *Dona Ana Sav. & Loan Ass'n v. Dofflemeyer*, 115 N.M. 590, 592-93, 855 P.2d 1054, 1056-57 (1993). Enactments of the legislature "must be interpreted to accord with common sense and

reason." Morningstar Water v. Farmington Mun. Sch., 120 N.M. 307, 319, 901 P.2d 725, 737 (1995) (quoting Sandoval v. Rodriguez, 77 N.M. 160,163, 420 P.2d 308, 310 (1966)). Without hesitation, courts disregard form over substance. See, e.g., Naranjo v. Bd. of Educ., 119 N.M. 401, 405, 891 P.2d 542, 546 (1995); Rauscher, Pierce, Refsnes, Inc. v. Taxation and Revenue Dept., 2000-NMCA-065, ¶ 8, 129 N.M. 404, 9 P.3d 648, aff'd, 2002-NMSC-013, 132 N.M. 226, 46 P.3d 687.

In the context of construing the Procurement Code, protecting the public interest is the most important goal of that Code. BC & L Pavement Services, Inc. v. Higgins, 2002-NMCA-087, ¶ 16, 132 N.M. 490, 51 P.3d 533. In the context, specifically, of Chapter 99, that public interest lies in securing bonding where required and in avoiding circumvention of Chapter 99 by contrived and artificial means.

The facts of the question presented illustrate an artificial division of a subcontractor's bid. The several component bids are not "separate" bids, but rather are, together, a "package," because the contractor must accept the entire lot if he chooses to engage the services of that particular subcontractor. The division appears thus to be contrived, and the evident purpose of that division seems designed to circumvent Chapter 99's bonding requirements. That circumvention is not, we believe, consistent with the intent of the legislature.

Accordingly, we advise that a subcontractor is required to submit a performance and payment bond in the factual situation presented by your question.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

Andrea R. Buzzard
Assistant Attorney General

[1] Rules promulgated by the General Services Department to implement the Procurement Code do not expand upon the statutory language. NMAC 1.4.1.49 provides: "Procurement requirements shall not be artificially divided so as to constitute a small purchase under Sections 1.4.1.48 through 1.4.1.52 of this rule." See also NMAC 2.81.4.12, pertaining to rules of the New Mexico Retiree Health Care Authority: "E. Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section."