Opinion No. 39-3174

June 9, 1939

BY: FILO M. SEDILLO, FRED J. FEDERICI,

TO: Mr. Ross L. Malone, Jr. City Attorney, Roswell, New Mexico.

*{*63}* This office is in receipt of your letter dated June 7 wherein an interpretation is sought of Chapter 233 of the Session Laws of 1939, which Act relates to purchases made by state, county and municipal boards and other state agencies, etc., and requiring submission of competitive bids in certain cases.

Ordinarily this office issues rulings only to state departments and district attorneys. However, since your inquiry relates to matters affecting public officials at large and involves a construction affecting a statute about to go into effect, we will be glad to give you our views on the matters under inquiry.

You state your first inquiry as follows:

"Does the requirement that purchases be made from retail establishments, etc., as provided in this Section apply only to goods which are included in the inventory of the purchaser within this State, and upon which taxes have been paid, or does it apply to any goods upon which a New Mexico merchant might bid, regardless of whether he carries such goods in stock, or has them in stock at the time? In other words, would the 5 per cent differential in favor of New Mexico dealers apply on articles which the New Mexico dealer does not carry in stock, but merely expects to order from out of the State in the event he is the successful bidder?"

The pertinent part of the Act involved within the subject of this inquiry is that portion of Section 3 providing as follows:

"All purchase of goods made by any purchaser to which this act is applicable shall be from manufacturers, distributors, or retail establishments having or maintaining in the regular course of business merchandise inventories within the State upon which taxes are paid, provided, however, where no facilities are vailable for the purchase of any particular goods within the State or where the same may be purchased at a saving of more than 5 per cent, such goods may be purchased outside of the State."

As I construe the foregoing portion of the statute it does not mean that the preference in favor of the New Mexico dealer is limited to goods maintained in his inventory in the regular course of business upon which taxes are paid. The preference as I see it is in favor of the New Mexico dealer having or maintaining in the regular course of business merchandise inventories *{*64}* within the state upon which taxes are paid and this preference attaches to any goods such dealer may offer to sell to the local government regardless of whether he has such goods in his inventoried stock at the time. In other

words, the preference is given to the dealer who has in the state an established place of business and pays taxes on his merchandise inventories within the state. In short, the state, through its legislature, has spoken and said that if out-of-state concerns want to sell goods and supplies to our local government, those out-of state concerns should come within our state and establish themselves as local dealers in fact. Otherwise, in our purchases of governmental supplies we shall give a preference to those merchants who have seen fit to come into our borders and who pay taxes and thus share the expenses of our local government.

You also make inquiry as to the constitutionality of the Act from the standpoint of its possible discriminatory nature as to out-of-state merchants who desire to sell goods to the state and its subdivisions.

This office in Opinion No. 1704 held constitutional the so-called public printing bill (Chapter 168, Session Laws of 1937), which bill has provisions very analogous and similar to the bill here involved. I enclose herewith a copy of that opinion for your information.

However, I fail to see where the constitutionality of this Act is of any concern to the state, county, district or municipal officers of this state effected thereby for the simple reason that such public officials are in no position to question the constitutionality of the Act. In other words, the officers involved violate no duty by complying with the Act, and if they fail to comply with the Act, they cannot excuse their noncompliance therewith on the grounds that the statute is unconstitutional.

Our Supreme Court in the case of State ex rel Davidson vs. Sedillo, 34 N.M. 1, 275 P. 765, has cited with approval the following statement of law:

"The better doctrine, supported by an increasing weight of authority, is that a mere subordinate ministerial officer, to whom no injury can result and to whom **no violation of duty can be imputed by reason of his complying with a statute,** will not be allowed to question its constitutionality."

In the same opinion our Supreme Court cites with approval the following statement of the law taken from a Florida case:

"The contention that the oath of a public official requiring him to obey the Constitution places upon him the duty or obligation to determine whether an act is constitutional before he will obey it is, I think, without merit. The fallacy in it is that every act of the Legislature is presumably constitutional until judicially declared otherwise, and the oath of office 'to obey the Constitution' means to obey the Constitution, not as the officer decides, but as judicially determined. The doctrine that the oath of office of a public official requires him to decide for himself whether or not an act is constitutional before obeying it will lead to strange results, and set at naught other binding provisions of the Constitution."

See also the case of Hutcheson vs. Gonzalez, 41 N.M. 474, 71 P. (2d) 140.

In view of the fact that this opinion must be considered as advisory only to public officials, and whereas it seems very remote that persons other than public officials are attempted to be bound by the Act, we are therefore constrained to hold as we do with reference to the constitutional question involved, if any.

Trusting the foregoing will be of some information to you, I am,

Asst. Atty. Gen.