LETTER OPINION
2002-L-33

June 6, 2002

Honorable Francis J. Wald
State Representative
PO Box 926
Dickinson, ND 58602-0926

Dear Representative Wald:

Thank you for your letter asking whether the city of Grand Forks was required to comply with the state bidding statutes when the Grand Forks Growth Fund Authority loaned public funds to finance improvements to a city-owned building that is leased to Cirrus Design (Cirrus), an airplane manufacturing business. You indicated that Cirrus hired an architect to design improvements to the heating, ventilation, and air conditioning (HVAC) system of the city-owned building leased to Cirrus. You also indicated that the architect issued "bid invitation letters" to various area general contractors, followed by an interview process at the conclusion of which Cirrus selected a general contractor. You stated that competitive bidding did not occur in the selection process for the general contractor. Cirrus obtained loan financing for the project from the Grand Forks Growth Fund Authority and the North Dakota Development Fund in the amount of $1,000,000; $750,000 came from the Growth Fund, and $250,000 came from the North Dakota Development Fund.

In your letter you cite to provisions contained in N.D.C.C. ch. 48-01.1 which require competitive bidding for certain public improvements. Section 48-01.1-03, N.D.C.C., requires a governing body to advertise for bids for public improvements in excess of $100,000. Chapter 48-01.1 requires a governing body to award a contract for the construction of a public improvement to the lowest responsible bidder or lowest and best bidder unless an emergency situation exists. N.D.C.C. §§ 48-01.1-02, 48-01.1-05(4), 48-01.1-06, 48-01.1-07. A public improvement is defined in N.D.C.C. § 48-01.1-01(6) as "any improvement the cost of which is payable[1] from taxes or other funds under the control

[1] While it is undisputed in this instance that the improvements were financed, in part, by a loan from the Growth Fund, which derives its funds primarily from a portion of city sales taxes, that does not really end the inquiry as to whether the improvement was "payable from taxes or other funds under the control of a governing body" within the

of a governing body including improvements for which special assessments are levied." You specifically ask whether the city of Grand Forks acted unlawfully by not following the competitive bidding requirements under N.D.C.C. ch. 48-01.1.

In this case, the financing entity is the Grand Forks Growth Fund, a job development authority formed by the city of Grand Forks. See N.D.C.C. ch. 40-57.4, Grand Forks City Code §§ 24-0101 and 24-0103. It has, by ordinance, the authority to "enter into agreements with private and public entities," "loan, grant, or convey any funds or other property held by the authority for any purpose necessary or convenient to carry into effect the objective of the authority," and to "improve buildings." Id. at § 24-0104. City job development authorities are governed by N.D.C.C. ch. 40-57.4. The powers of a city job development authority are set out in N.D.C.C. § 40-57.4-03 and are substantially similar to the powers contained in the Grand Forks City Code. According to city ordinance and information provided by the Grand Forks city attorney, the Grand Forks Growth Fund is funded primarily from a portion of a city sales tax allocated for economic development. See Grand Forks City Code § 24-0101(1). The board of directors of the Growth Fund consists of all members of the Grand Forks City Council and the mayor who serve four-year staggered terms. See Grand Forks City Code §§ 24-0105 and 24-0106.

The city[2] does not dispute that the city and the Growth Fund did not follow the competitive bidding statutes. It is also undisputed that the cost of the improvements to the HVAC system in the publicly owned building was in excess of $100,000 and that the loan made by the Growth Fund consists primarily of taxes or other public funds under the control of the Growth Fund. According to information provided by the city attorney to this office, the building is relatively new and the HVAC improvements are not general improvements to the building systems for the benefit of the city or the Growth Fund but, rather, specific

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meaning of N.D.C.C. § 48-01.1-01(6). Tax revenues did, in fact, initially pay part of the costs of the improvements; however, in this case, the financing consisted of a secured loan by the Growth Fund which is ultimately payable by Cirrus. "A sum of money is said to be payable when a person is under an obligation to pay it. Payable may therefore signify an obligation to pay at a future time. . . ." Black's Law Dictionary 1128 (6th ed. 1990). Thus, while the improvements were initially financed by tax money, they will ultimately be paid for from Cirrus' private funds as it pays off its secured loan obligation over time.

[2] Grand Forks is a home rule city. Although the city's home rule charter contains the very broad power authorized by N.D.C.C. § 40-05.1-06(2) to "control its finances and fiscal affairs," the city has not implemented its own public improvement bidding requirements by ordinance in order to supersede the bidding requirements contained in N.D.C.C. ch. 48-01.1. See N.D.C.C. §§ 40-05.1-05 and 40-05.1-06; Letter from Attorney General Nicholas Spaeth to Rod Larson (Feb. 3, 1992).

improvements to accommodate production of composite airplane components. Letter from Grand Forks City Attorney to North Dakota Attorney General's Office (May 13, 2002). The main purpose for the improvements is to control humidity and temperature during production of aircraft components. Id. Cirrus is fully responsible for the design, procurement, cost, installation, operation, and maintenance of these improvements, trade fixtures, and equipment, not the City of Grand Forks. Id. The improvements to the HVAC system will be owned by Cirrus and will be removable from the building at the termination of the lease between the city and Cirrus. Id. Cirrus is responsible for any repairs necessitated by the removal of these trade fixtures and equipment. Id. Thus, the city contends that while the changes to the HVAC system may be improvements, they are not public improvements within the meaning of N.D.C.C. ch. 48-01.1. The improvements are essentially for a private production purpose, were contracted for by the private company, would be owned and controlled by the private company, and would be removable by them at the termination of the lease. While tax money will be used to finance the improvements initially, the pertinent part of the financing arrangement is actually a secured loan which will be repaid by Cirrus to the Growth Fund, presumably with its own private funds.

The city submitted certain documents supporting its position to this office, including the long-term building lease between the city and Cirrus, a promissory note evidencing the loan to Cirrus, and a security agreement securing repayment of the loan. Section Five of the building lease recites that "[a]ll Lessee's trade fixtures and equipment shall remain Lessee's property and may be removed, but Lessee shall repair any damage to the leased premises caused by such removal." The security agreement recites that Cirrus is the owner of the financed property or will acquire ownership with the proceeds of the loan. A list of the equipment is attached to both the promissory note and a UCC financing statement included with the documents. The major components listed include dehumidifiers, air-cooled chillers, air handlers, dry coolers, and related equipment.

The issue is whether the improvements to the HVAC system are public improvements within the meaning of the bidding statutes. While on the surface it may appear that the bidding statutes applied because there were improvements made to a public building which at least initially were payable from public funds, the information provided by the city and case law indicate otherwise.

According to one noted authority:

> [T]he question whether a particular contract requires competitive bidding as a condition precedent to awarding the same depends upon the construction of the particular statute, ordinance or charter; in the absence of some legal requirement, contracts need not be let by competitive bidding. Ordinarily, a

> statute requiring competitive bidding on public improvements is applicable only to contracts whereby the city itself assumes an obligation or indebtedness.

13 Eugene McQuillin, The Law of Municipal Corporations § 37.106 (3d ed. 1997). In this instance, the city has not assumed an obligation to pay for the improvements. Instead, Cirrus, as the borrower or obligor under the promissory note and loan agreement, has assumed an obligation or indebtedness. The Growth Fund is the lender or obligee. See Grand Forks Growth Fund Loan Agreement and Promissory Note executed by Cirrus on April 24, 2002.

A number of courts have determined in the related context of public works bonding and prevailing wage statutes that even though public funds, such as economic development funds, may have been utilized to finance a project, the projects were not public works or public improvements within the meaning of those statutes where the projects were owned or controlled by private entities or constructed by the private entities and where little or no benefit inured to the public. See generally Annotation, *What Entities or Projects are "Public" for Purposes of State Statutes Requiring Payment of Prevailing Wages on Public Works Projects*, 5 A.L.R.5th 470 (1993) (citing, e.g., Hart v. Holtzman, 626 N.Y.S.2d 145 (N.Y. App. Div. 1995) (housing projects for low income and homeless persons which were publicly financed but privately owned and constructed were not public works subject to prevailing wage statute where primary purpose was to benefit private developers who retained ownership and construction risk; partial or even complete government funding of improvement is insufficient to convert private project into public works); 60 Market Street Assoc. v. Hartnett, 551 N.Y.S.2d 346 (N.Y. App. Div. 1990) (in order for a project to constitute a public work, the primary objective must be to benefit the public; the statute is inapplicable to project constructed by a private company with goal to make a profit); Cattaraugus Community Action, Inc. v. Hartnett, 560 N.Y.S.2d 550 (N.Y. App. Div. 1990) (construction of home for adolescent mothers by private nonprofit corporation undertaken by corporation using funds supplied by the state did not constitute public works since corporation privately developed and owned it after construction, home was used for a specific and narrowly defined group, and state did not occupy or hold title to the project); Penfield Mechanical Contractors, Inc. v. Roberts, 462 N.Y.S.2d 393 (N.Y. Sup. Ct. 1983), aff'd, 470 N.E.2d 870 (N.Y. 1984) (project financed through county industrial agency's issuance of industrial development revenue bonds not public works within meaning of prevailing wage act where use was private, ownership and control was retained by private company, and actual construction was accomplished by private parties). See also Annotation, *What Constitutes "Public Work" Within Statute Relating to Contractor's Bond*, 48 A.L.R.4th 1170 (1986).

Similarly, in Davidson Pipe Supply Co., Inc. v. Wyoming County Indus. Dev. Agency, 648 N.E.2d 468 (N.Y. 1995), the court determined that an energy cogeneration construction project developed with industrial development agency financial assistance was not a public improvement under a construction bond posting statute. Id. at 471. Under the pertinent documents, all risks and benefits associated with the project were borne by the privately owned company. Id. at 469. Even though the industrial development agency held temporary title under the documents, the private company was in business for profit and was the ultimate beneficiary of the project, and profits and losses belonged to it. Id. at 470. The court characterized the public agency's ownership interest as only being temporary and for tax purposes. Id.

Likewise, in Judd Supply Co., Inc. v. Merchants & Manufacturers Insurance Co., 448 N.W.2d 895 (Minn. App. 1989), the court determined that a privately owned construction project for which a city provided economic development assistance was not a public work within the meaning of the statute imposing a mandatory contractor bond. The court noted that "[p]rivate development is not transformed into 'public work' simply because it receives public financial assistance." Id. at 897.

These cases demonstrate the fact that while there may be some public financial assistance in an economic development project, that fact does not make the project a public work or public improvement project triggering statutory requirements such as prevailing wage payments or contractor bonds. The courts look to other factors to determine if the projects are truly public, such as the use and benefit of the project, ownership, and what entity developed and constructed the project. See, e.g., Affiliated Construction Trades Foundation v. Univ. of West Virginia Bd. of Trustees, 557 S.E.2d 863, 879 (W. Va. 2001) (in determining whether the state or its agencies are involved in a construction project sufficient to invoke the competitive bidding statutes, a court should examine who initiated the construction project, the extent of control retained by the state during the development and construction phases, the extent to which the project will be used for a public purpose, whether public funds are used either directly or indirectly, and all other relevant factors bearing on the issue of whether the construction is properly viewed as government construction). According to information provided to this office about the Grand Forks project, although public funds financed the project, it was planned by and to be constructed by private entities; its use is primarily for the manufacturing production of the private entity; it is owned by the private entity; and the equipment can be removed by the private entity at the termination of the lease. Furthermore, the public financial assistance was in the form of a secured loan to be payable over time from the private entity's own funds.

Under these particular facts and circumstances, it is my opinion that privately owned, severable improvements to a city building constructed for the use and benefit of the private

entity, even if financed with public monies through a loan, do not constitute public improvements within the meaning of N.D.C.C. ch. 48-01.1 and are not subject to the bidding requirements of that chapter.

Sincerely,

Wayne Stenehjem
Attorney General

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