

**LETTER OPINION
2012-L-08**

July 5, 2012

Mr. William G. Goetz
Chancellor
North Dakota University System
600 East Boulevard Avenue, Dept. 215
Bismarck, ND 58505-0230

Dear Mr. Goetz:

Thank you for your letter asking several questions related to soliciting bids for public improvements under N.D.C.C. ch. 48-01.2. For the reasons indicated below, it is my opinion that N.D.C.C. ch. 48-01.2 does not authorize a state-supported institution of higher education to use institution employees to make “public improvements” in-house when the estimated cost of the construction is over \$100,000. It is my further opinion that “routine operation or maintenance” is exempt from N.D.C.C. ch. 48-01.2, even if the cost is over \$100,000.

ANALYSIS

You ask whether N.D.C.C. ch. 48-01.2 authorizes an institution of higher education to use institution employees to make “public improvements” in-house when the estimated cost of the construction is over \$100,000. N.D.C.C. § 48-01.2-04(1) states, “[e]xcept as otherwise provided in this chapter, if the estimated cost for the construction of a public improvement is in excess of . . . [one hundred thousand dollars], the governing body shall advertise for bids”¹ Relative to the underlined language in the quote above, N.D.C.C. ch. 48-01.2 does not provide for an exception that would allow work to be done in-house when the estimated cost for the construction of a public improvement is over \$100,000.

In addition to the fact that the Legislature did not provide an exception that would allow in-house work under N.D.C.C. ch. 48-01.2, there are two statutes that suggest the Legislature has contemplated the use of in-house work, but limited such use. Section 25-01.1-33, N.D.C.C., allows the work of patients in state institutions to be utilized to erect, repair, or improve buildings, grounds, or properties when such work may possibly benefit the patient and is not detrimental to the patient’s health or treatment, and when the use of

¹ N.D.C.C. § 48-01.2-04 (emphasis added). “‘Governing body’ means the governing officer or board of a state entity or a political subdivision.” N.D.C.C. § 48-01.2-01(16).

such labor “will not substantially depart from the requirements of chapter 48-01.2.”² Also, N.D.C.C. § 61-35-94 authorizes water districts to make certain improvements and cause the work to be done directly by the water district if all bids for a project are rejected and if the improvement is “no more than the amount provided for construction of a public improvement under section 48-01.2-02.”³ These statutes indicate that the Legislature has contemplated the use of in-house labor to do work on public improvements. The fact that the Legislature did not authorize such use in N.D.C.C. ch. 48-01.2 indicates the Legislature did not intend to allow the use of in-house labor when the estimated cost for the construction of a public improvement is over \$100,000.

An argument could be made that the use of in-house employees on public improvements over \$100,000 is a necessarily implied exception to N.D.C.C. ch. 48-01.2. However, “[t]he contention . . . that the use of . . . employees to perform work on a public project is a necessarily implied exception to the competitive bidding requirements imposed upon it by statute has been rejected by the courts.”⁴ Thus, it is my opinion that N.D.C.C. ch. 48-01.2 does not authorize an institution of higher education to use institution employees to make “public improvements” in-house when the estimated cost of the construction is over \$100,000.⁵

The chapter on public improvements and bidding states that if the estimated cost for the construction of a public improvement⁶ is more than \$100,000, the governing body shall procure plans, drawings, and specifications from an architect or engineer, and solicit bids for the project.⁷ The chapter defines “construction”:

“Construction” means the process of building, altering, repairing, improving, or demolishing any public structure or building or other improvement to any public property. The term does not include the routine operation or maintenance of existing facilities, structures,

² N.D.C.C. § 25-01.1-33.

³ N.D.C.C. § 61-35-94.

⁴ 13 McQuillin, Municipal Corporations § 37:107(rev. ed. 2008), citing Killeen v. City of San Bruno, 128 Cal.Rptr. 760 (1976).

⁵ Two other questions you asked assume a portion of the work on a project over \$100,000 can be done in-house. Since I have concluded that a portion of the work on a project over \$100,000 cannot be done in-house, those questions are moot.

⁶ “‘Public improvement’ means any improvement undertaken by a governing body for the good of the public and which is paid for with public funds and constructed on public land or within a public building and includes an improvement on public or nonpublic land if any portion of the construction phase of the project is paid for with public funds. The term does not include a county road construction and maintenance, state highway, or public service commission project governed by title 11, 24, or 38.” N.D.C.C. § 48-01.2-01(20).

⁷ See N.D.C.C. §§ 48-01.2-02 and 48-01.2-04.

buildings, or real property or demolition projects costing less than the threshold established under section 48-01.2-02.1.⁸

The threshold established under section 48-01.2-02.1 is \$100,000.⁹

Regarding the last sentence in the definition of “construction” above, you ask whether “the routine operation or maintenance of existing facilities, structures, buildings, or real property” must cost less than \$100,000 to be exempt from N.D.C.C. ch. 48-01.2. The question is, does the phrase “costing less than the threshold established under section 48-01.2-02.1” apply to only “demolition projects,” or does it also apply to “the routine operation or maintenance of existing facilities, structures, buildings, or real property.”

“A generally accepted rule in aid of the construction of statutes is that a limiting phrase or clause is to be restrained to the last antecedent unless the subject matter or context indicates a different legislative intent.”¹⁰ In the definition of “construction,” the limiting phrase of “costing less than [\$100,000]” applies to “demolition projects,” and does not apply to “the routine operation or maintenance of existing facilities, structures, buildings, or real property.” The subject matter or context does not indicate a different legislative intent. Thus, it is my opinion that “the routine operation or maintenance of existing facilities, structures, buildings, or real property” is exempt from the requirements of N.D.C.C. ch. 48-01.2, even if the routine operation or maintenance costs more than \$100,000.

You indicate that the definition of “construction” in N.D.C.C. § 48-01.2-01(4), quoted above, includes “repairing,” but excludes “routine operation or maintenance.” You ask if the replacement of existing surfaces (like wall finishes, flooring, carpeting, and ceiling) and replacement of building components subject to wear and tear constitute “routine maintenance.”

⁸ N.D.C.C. § 48-01.2-01(4).

⁹ See N.D.C.C. § 48-01.2-02.1.

¹⁰ Kohler v. Stephens, 24 N.W.2d 64, 72 (N.D. 1946). In the Kohler case, the North Dakota Supreme Court considered state laws that provided that it shall be prima facie lawful for the driver of a vehicle to drive the same at a speed not exceeding “Twenty miles an hour in traversing or going around curves or traversing a grade upon a highway *when the driver’s view is obstructed within a distance of one hundred feet along such highway in the direction in which he is proceeding.*” Id. at 71. The Court stated, this law “deals with two separate propositions with respect to speed. The first is ‘in traversing or going around curves.’ The second is ‘traversing a grade upon a highway when the driver’s view is obstructed within a distance of one hundred feet along such highway in the direction in which he is proceeding.’ Under the rule of the ‘last antecedent’ the qualification with respect to obstructed view has no application to traversing or going around curves.” Id. at 72.

“Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears”¹¹ “Routine” means:

1. A prescribed and detailed course of action to be followed regularly; standard procedure.
2. A set of customary and often mechanically performed procedures or activities.¹²

“Maintenance” means “1. a. The action of maintaining. b. The state of being maintained. 2. The work of keeping something in proper condition.”¹³ To “maintain” means “[t]o preserve or keep in a given existing condition, as of efficiency or repair: *maintain two cars.*”¹⁴ To “repair” means “1. To restore to sound condition after damage or injury; fix. 2. To set right; remedy: *repair an error.* 3. To renew or refresh.”¹⁵

As you point out, the definition of “construction” in N.D.C.C. ch. 48-01.2 includes “repairing,” but does not include “routine maintenance.” As indicated in the dictionary definitions above, the definition of “maintain” includes “repair.” The key word that determines the type of maintenance or repair that is exempt from N.D.C.C. ch. 48-01.2 is the word “routine.” The “maintenance of existing facilities, structures, buildings, or real property” that is “routine” is exempt from N.D.C.C. ch. 48-01.2. Whether the replacement of existing surfaces (like wall finishes, flooring, carpeting, and ceiling) and replacement of building components subject to wear and tear constitute “routine maintenance,” which would be exempt from N.D.C.C. ch. 48-01.2, is a question of fact. This office has a longstanding policy not to determine factual matters in legal opinions.¹⁶

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹⁷

¹¹ N.D.C.C. § 1-02-02.

¹² The American Heritage Dictionary 1074 (2d coll. ed. 1991).

¹³ The American Heritage Dictionary 757 (2d coll. ed. 1991).

¹⁴ Id. (emphasis added).

¹⁵ The American Heritage Dictionary 1047 (2d coll. ed. 1991).

¹⁶ See N.D.A.G. 2012-L-05.

¹⁷ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).