LETTER OPINION
96-L-66

April 8, 1996

Mr. Roger D. Schell
Bottineau City Attorney
116 West 5th Street
Bottineau, ND 58318

Dear Mr. Schell:

Thank you for your March 14, 1996, letter asking whether a city may rely on State Department of Transportation (DOT) bid announcement procedures used for highway construction purposes where the city intends to fund its portion of the construction contract using special assessment authority under N.D.C.C. ch. 40-22.

Since 1941, N.D.C.C. § 40-22-06 had authorized city governing bodies who were contracting with a state agency, board of county commissioners, water resource board, or federal agency for a project authorized under N.D.C.C. ch. 40-22 to dispense with requirements of N.D.C.C. ch. 40-22 for matters preliminary to construction of the improvement (including plan preparation and approval, advertisement for bids, and execution of contracts and bonds). 1941 N.D. Sess. Laws ch. 203.

House Bill No. 1452 was introduced and approved during the 1995 legislative session. The purpose of the bill was to consolidate many statutes that specified bidding requirements for various political subdivisions. Hearing on H. 1452 Before the Senate Committee on Political Subdivisions, 54th N.D. Leg. (March 17, 1995) (Statement of Curt Peterson).

As 1995 House Bill No. 1452 was introduced and as it was enacted and approved, the sentence contained in N.D.C.C. § 40-22-06 authorizing cities to dispense with procedures preliminary to construction when the city contracted with the state, a county, a water resource board, or the federal government was deleted. Although other amendments were made to the bill during its progress through the Legislative Assembly, such as changing amendments to N.D.C.C. § 40-22-19 concerning the number and location of advertisements for bids and reliance on other chapters for bid advertising and contracting, no changes were made concerning the amendment to N.D.C.C. § 40-22-06.

The amendment of an existing statute indicates the Legislature's intent to change the original act. Bostow v. Lundell Manufacturing

Company, 367 N.W.2d 20, 22 (N.D. 1985); City of Minot v. Knudson, 184 N.W.2d 58 (N.D. 1971).

Because the amendment to N.D.C.C. § 40-22-06 clearly deletes authority for the city government to dispense with procedures preliminary to construction as required by N.D.C.C. ch. 40-22 when agreeing with the state, a county, a water resource board, or the federal government for the construction of a project, it is my opinion that a city may not rely on bid procedures performed by the state, a county, a water resource board, or the federal government for projects undertaken pursuant to N.D.C.C. ch. 40-22 unless those procedures comply with that chapter, and specifically that contract proposals for joint projects be advertised in compliance with N.D.C.C. § 40-22-19.

However, in this instance it is my understanding from information provided to a member of my staff that the proposal for the making of the joint improvement was in fact advertised once each week for three weeks in the Bottineau Courant in apparent compliance with the requirements of N.D.C.C. § 40-22-19 (which requires advertising in the official newspaper of the city once each week for two consecutive weeks).

While it may seem pointless for the governing body of the city to advertise for bids, or to participate in the advertisement for bids under N.D.C.C. § 40-22-19 when it may not be directly entering into a construction contract with the successful bidder, there is nothing in the text of House Bill 1452 or the legislative history to indicate a legislative intent to absolve the city from such a preliminary requirement. The Legislature could easily have added an exception to N.D.C.C. § 40-22-19 in House Bill 1452 to specifically exempt joint projects under N.D.C.C. § 40-22-06 from the advertising requirements in N.D.C.C. § 40-22-19. Further, while it may make some sense to exempt the city from advertising for bids when it would not be entering into a construction contract with the winning bidder, it also makes sense to continue to require the city to comply with the preliminary step of preparing and approving plans and specifications for its part of the joint project pursuant to N.D.C.C. § 40-22-11. It would be inconsistent for me to give an opinion that some of the preliminary requirements for doing a special assessment financing (formerly mentioned in N.D.C.C. § 40-22-06) could be dispensed with, but not others.

One phrase in your letter asks whether you may require the DOT to conform to certain other provisions of law contained in N.D.C.C. ch.

48-01.1 for the highway project in question. It does not appear that a city may require the DOT or a county to act in conformance with N.D.C.C. ch. 48-01.1 for highway projects because that chapter does not apply to county road construction or state highway construction projects undertaken pursuant to N.D.C.C. titles 11 or 24. N.D.C.C. § 48-01.1-01(4). However, by agreement, the parties might determine that the procedures in use for highway projects could be modified to comply with N.D.C.C. titles 11 and 24 as well as N.D.C.C. chs. 40-22 and 48-01.1. These matters would be subject to negotiation and agreement between the parties.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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