

LETTER OPINION
98-L-97

August 11, 1998

Ms. Merle A. Torkelson
McLean County State's Attorney
PO Box 1108
Washburn, ND 58577-1108

Dear Ms. Torkelson:

Thank you for your letter asking my opinion whether a private party who desires to make county-approved improvements to a county road using the private party's own funds must comply with the competitive bidding requirements applicable to public contracts.

Generally, the construction of county roads and bridges is a governmental function. See Zueger v. Boehm, 164 N.W.2d 901, 906 (N.D. 1969). While the Legislature has not delegated to private parties the power or ability to construct county roads or bridges, the Supreme Court has stated they may be granted that right "upon proper authorization from the proper public authority." Id. Since a county is responsible for the construction and maintenance of county roads and bridges, it appears the county's authorization would be sufficient in such an instance. See N.D.C.C. §§ 24-05-17, 24-08-04.

Once the private party obtains that authorization, the private party then "becomes the agent of the county and the county remains subject to all statutory provisions applicable to the improvement as if it were being constructed by the county" Zueger, 164 N.W.2d at 907. Accord 1996 N.D. Op. Att'y Gen. L-87. One statutory provision applicable to counties is the necessity to comply with the competitive bidding process applicable to public contracts. See, e.g., N.D.C.C. §§ 24-05-04 (county roads) and 24-08-01, 24-08-03 (county bridges). However, neither Zueger nor 1996 N.D. Op. Att'y Gen. L-87 dealt with the applicability of public bidding requirements to private parties constructing county-approved road improvements at their expense.

In construing and applying statutes, the guiding rule is to ascertain the intent of the Legislature. The Legislature's intent must be sought initially from the language of the statute. District 1 Republican Com. v. District 1 Democratic Com., 466 N.W.2d 820, 824 (N.D. 1991). If statutory language is clear and unambiguous, the legislative intent is presumed to be clear from the face of the statute. If, however, statutory language is ambiguous or of doubtful meaning, the courts may look to extrinsic aids to assist in interpreting the statute. Id. at 824-25.

The aforementioned bidding statutes appear clear on their face. For example, N.D.C.C. § 24-05-04 provides, in part, that "any contract for highway improvement, except necessary repairs for road machinery, which exceeds the sum of fifty thousand dollars must be advertised as provided by law for the purchase of county supplies." N.D.C.C. § 24-08-01 provides:

[I]f the cost of the bridge exceeds the sum of five hundred dollars, the board of county commissioners shall view and investigate the necessity of the proposed bridge. If the board approves the petition, it shall proceed to advertise in the official newspaper of the county, for a period of thirty days, the plans and specifications of the proposed bridge, asking for sealed bids for the building of such bridge, to be submitted to it at the next regular or special meeting, at which the board shall proceed to examine all proposals or bids for the building of such bridge.

N.D.C.C. § 24-08-03(2) further provides that "[i]f the cost of rebuilding or repairing a bridge would exceed thirty thousand dollars on estimate of the county engineer and upon the approval of the estimate by the department, the county commissioners shall advertise for bids and award the contract pursuant to section 24-08-01."

However, statutes that are clear and unambiguous may contain a latent ambiguity when applied to a particular situation. Letter from Attorney General Heidi Heitkamp to John Goff (July 21, 1995). "A statutory provision is ambiguous if it is susceptible to differing, but rational meanings." Zueger v. North Dakota Ins. Guar. Ass'n, 494 N.W.2d 135, 137 (N.D. 1992). If a statute is ambiguous, the intention of the Legislature may be determined by consideration of the object sought to be obtained by the statute and the consequences of a particular construction of the statute, among other things. N.D.C.C. § 1-02-39.

Although the aforementioned statutes appear clear on their face, they contain a latent ambiguity when applied to the particular situation presented in this instance, i.e., because these statutes ordinarily only come into play when a county is making a road improvement directly, it is unclear whether such public bidding requirements apply to any road improvement contract over the required statutory threshold, or whether they only apply to road improvement contracts between a county and a contractor. Because of this latent ambiguity, it is appropriate to use extrinsic aids to determine the Legislature's intent. N.D.C.C. § 1-02-39.

In Danzl v. City of Bismarck, 451 N.W.2d 127, 130 (N.D. 1990), the North Dakota Supreme Court explained the purpose behind the bidding requirements:

Statutory competitive bidding requirements are enacted for the benefit of the public and taxpayers to invite competition; to prevent favoritism, fraud, corruption, improvidence, extravagance, and collusion; and to secure the best work or supplies at the lowest price practicable. See, e.g., Lasky v. City of Bad Axe, 352 Mich. 272, 89 N.W.2d 520 (1958); Griswold v. Ramsey County, 242 Minn. 529, 65 N.W.2d 647 (1954); Bolander & Sons v. City of Minneapolis, 438 N.W.2d 735 (Minn. App. 1989); 13 McQuillin Mun. Corp., Sec. 37.106 (Rev. 3rd Ed., 1989 Supp.). Competitive bidding requirements "promote honesty, economy, and aboveboard dealing in the letting of public contracts." Coller v. City of St. Paul, 223 Minn. 376, 26 N.W.2d 835, 841 (1947).

In Becker Elec., Inc. v. City of Bismarck, 469 N.W.2d 159, 160 (N.D. 1991), the Court further noted:

It is well settled that statutory competitive bidding requirements are enacted for the benefit of the public to invite competition, to prevent favoritism, fraud, and collusion, and to secure the best work and supplies at the lowest price. Because these statutes are enacted to benefit the public and are not intended to directly benefit contractors, it is equally well settled that a contractor generally may not recover damages against a public entity for violation of the competitive bidding statutes.

(Citations omitted.)

Thus, the primary purpose of these statutes is to protect the public treasury. That purpose is not effectuated by attempting to apply the public bidding requirements to a private entity that is willing to make a county-approved road improvement at its own expense or using its own materials, labor, and equipment.

Furthermore, in enacting a statute, it is presumed that the Legislature intended a reasonable result. N.D.C.C. § 1-02-38(3). In a May 18, 1988, letter from Attorney General Nicholas J. Spaeth to Rolland W. Redlin, Attorney General Spaeth determined that requiring a licensed architect to draft plans and specifications for a parking lot was unreasonable even though it was required by statute. Attorney General Spaeth reasoned that since an architect's expertise is generally limited to structures rather than parking lots, the statutory requirement was unreasonable and the appropriate governing

board could retain an engineer or other competent person to draft the plans and specifications.

Likewise, in the present instance, it would be unreasonable to enforce a public bidding requirement designed to protect the public treasury when no public funds would be directly expended in the construction of the road improvement. While other applicable statutory requirements relating to approval, control, supervision, or inspection of the work performed by a private entity on the county road would be reasonably applicable,¹ the requirement that the county adhere to public bidding statutes in the present circumstance would not.

Thus, it is my opinion that a private party that offers to construct a county-approved improvement on a county road with its own funds need not comply with the competitive bidding procedures applicable to public contracts.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

¹E.g., N.D.C.C. §§ 24-05-17, 24-08-03(3),(4),(5),(6).