

N.D.A.G. Letter to Redlin (May 18, 1988)

May 18, 1988

Hon. Rolland W. Redlin
State Senator
District 40-50
1005 21st Street N.W.
Minot. ND 58701

Dear Senator Redlin:

Thank you for your letter of May 9, 1988, in which you request my opinion on two questions concerning the State Fair Association of North Dakota and the public bidding provisions of North Dakota law. Your first question is whether the State Fair Association of North Dakota is subject to the public bidding provisions for construction projects under North Dakota law regardless of whether or not state appropriated funds are used. Your second question is whether the improvement and/or construction of a parking lot which is an integral part of a public institution is subject to the public bidding provisions when the cost of the project significantly exceeds \$50,000.

The competitive bidding requirements for public improvements of the state and its political subdivisions are set forth in N.D.C.C. chs. 48-01 and 48-02. N.D.C.C. § 48-02-03 provides that "the governing board shall advertise for bids for the doing of the work for which plans, drawings, and specifications are required by section 48-02-02." N.D.C.C. § 48-02-02 states as follows:

48-02-02. Prerequisite to building and repair by contract --
Exceptions. If in altering, repairing, or constructing any building belonging or appertaining to any of the public institutions of the state, or to any county, city, park district, school district, or other political subdivision of the state, or in making any improvements connected with the building, the total estimated cost of all work involved amounts to more than fifty thousand dollars for the completed project, the governing body of the public institution, municipality, or political subdivision shall procure plans, drawings, and specifications for the work, upon competitive bids or otherwise as the board may deem necessary. In all cases where the estimated cost of the work exceeds fifty thousand dollars, the plans, drawings, and specifications must be procured from a licensed architect; provided, that in the case of public buildings in use by or to be used by the North Dakota agricultural experiment station in connection with farm or agricultural research operations, the plans, drawings, and specifications may, with the approval of the board of higher education, be procured from a registered professional engineer, providing the engineer is in the regular employment of the agricultural experiment station.

In determining whether the State Fair Association is subject to the competitive bidding requirements of N.D.C.C. ch. 48-02, it must initially be determined whether the State Fair Association is a "public institution of the state."

N.D.C.C. § 4-02.1-16 provides that "the state fair association may contract in its own name, but as an agency of the state, and shall make all of its purchases pursuant to the purchasing laws of the state through the office of management and budget, except as may be exempted therefrom by the director of the office of management and budget as provided by law." (Emphasis supplied.) N.D.C.C. § 4-02.1-17 provides:

4-02.1-17. Name in which business conducted and titles taken -- Execution of written instruments. All business of the association shall be conducted under the name of "North Dakota state fair association". Title to property obtained in regard to the operation of the association must be obtained and conveyed in the name of the state of North Dakota, doing business as the North Dakota state fair association. Written instruments must be executed in the name of the state of North Dakota.

(Emphasis supplied.) Additionally, the State Fair Association receives appropriations from the Legislative Assembly and is subject to the state's accounting system. N.D.C.C. § 4-02.1-15. The statutory authority discussed above clearly indicates that the State Fair Association conducts business as the state of North Dakota and, therefore, would constitute a "public institution" of the state as contemplated in N.D.C.C. § 48-02-02.

You also ask whether the applicability of the competitive bidding provisions is dependent on whether appropriated funds from the state are involved. In the first instance, it must be recognized that all public moneys must be appropriated by the Legislature prior to expenditure. N.D. Const. art. X, § 12. This is true regardless of whether or not the moneys come from the state's general fund. The State Fair Association has a standing and continuing appropriation for all non-general fund revenue. See N.D.C.C. § 4-02.1-15. Therefore, we assume that your question is actually whether the competitive bidding requirements apply only to general fund projects as opposed to special fund projects. N.D.C.C. ch. 48-02 does not distinguish between general funds and special funds and, therefore, its provisions apply whether or not state general fund money is involved.

Your second question asks whether the improvement and construction of a parking lot which is an integral part of a public institution is subject to the competitive bidding provisions of North Dakota law when the project's cost exceeds \$50,000. N.D.C.C. § 48-02-03 requires public bidding for "any improvements connected with the building."

In Farmers Union Cent. Exch., Inc. v. Reliance Ins. Co., 626 F. Supp. 583, (D.N.D. 1985), the United States District Court addressed the issue of whether the provisions of N.D.C.C. chs. 48-01 and 48-02 apply to road construction contracts. Concluding that the term "public improvement" as used in N.D.C.C. chs. 48-01 and 48-02 encompasses road construction projects, the court held that the provisions of N.D.C.C. chs. 48-01 and 48-02

are applicable to road construction contracts.

Although the North Dakota Supreme Court has not addressed this specific issue, it has interpreted N.D.C.C. ch. 48-02 as having a broad application. In Northern Improvement v. State, 213 N.W.2d 885, 887 (N.D. 1973), the court held that there was no dispute that the type of construction done, the repair of a broken sewer line under the Heart River that ran from the State Industrial School to the city sewer system in Mandan, fell within the scope of N.D.C.C. § 48-02-02.

The Attorney General's office has also broadly interpreted the scope of N.D.C.C. ch. 48-02. In a letter to Roy A. Neste dated August 4, 1969, the Attorney General concluded that the term "building" as used in N.D.C.C. § 48-02-02 includes such structures as a TV tower.

Applying the legal precedent discussed above to the question at hand, it is my opinion that a parking lot which is an integral part of a public building constitutes an "improvement connected with the building." Accordingly, the competitive bidding provisions of N.D.C.C. chs. 48-01 and 48-02 would be applicable to the factual situation described in your letter.

Although it is my conclusion that the construction of a parking lot is subject to the competitive bidding requirements of N.D.C.C. chs. 48-01 and 48-02, the requirement in N.D.C.C. § 48-02-02 that the plans, drawings, and specifications be prepared by a licensed architect probably would not be applicable in the context of constructing a parking lot because an architect's expertise is generally limited to structures. Statutes must be construed to avoid absurd and ludicrous results. Stutsman County v. State Historical Society, 371 N.W.2d 321, 325 (N.D. 1985). Therefore, in situations where the licensed architect requirement is nonsensical, it is appropriate for the governing board to retain an engineer or other competent person, as the facts may dictate, to draw the plans and specifications for the project.

It should also be noted that the competitive bidding requirements may be "waived by the governing board if it determines that an emergency situation exists requiring the prompt destruction, demolition, or repair of an existing building, facility, or portion thereof, and a contract may be made for such destruction, demolition, or repair without seeking bids." N.D.C.C. § 48-02-03.

I hope that this discussion has been of assistance to you.

Sincerely,

Nicholas J. Spaeth

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