

N.D.A.G. Letter to Wogsland (June 5, 1989)

June 5, 1989

Honorable Dan Wogsland
State Senator
District 23
Route 1, Box 196
Hannaford, ND 58448

Dear Senator Wogsland:

Thank you for your May 11, 1989, letter requesting my opinion on Senate Bill No. 2418 as it applies to a water treatment plant project in your district.

Senate Bill No. 2418 amends N.D.C.C. ch. 48-02 which sets forth the competitive bidding requirements for public construction projects. In your letter you request my opinion on two questions. Your first question is whether a project is subject to Senate Bill No. 2418 if the governing board advertises for bids prior to July 1, 1989, but the contract is awarded after July 1, 1989. Your second question is whether a water treatment plant is a public building subject to the competitive bidding requirements of N.D.C.C. ch. 48-02.

Your first question assumes that Senate Bill No. 2418 becomes effective on July 1, 1989. Senate Bill No. 2418 was filed with the Secretary of State on April 13, 1989. N.D. Const. art. IV, § 13, states in relevant part as follows:

Every law, except as otherwise provided in this section, enacted by the legislative assembly takes effect on July first after its filing with the secretary of state or ninety days after its filing whichever comes later, or on a subsequent date if specified in the law unless, by a vote of two-thirds of the members elected to each house, the legislative assembly declares it an emergency measure and includes the declaration in the Act.

Senate Bill No. 2418 was not declared to be an emergency measure and, therefore, will take effect on July 12, 1989 (90 days after April 13, 1989).

The issue presented in your first question is whether Senate Bill No. 2418 would apply to projects where the governing board has either commenced advertising or completed advertising as of the bill's effective date (July 12, 1989). N.D.C.C. § 1-02-10 provides that "[n]o part of this code is retroactive unless it is expressly declared to be so." Senate Bill No. 2418 does not contain a declaration that it is to be applied retroactively.

The term "retroactive" describes acts which operate on transactions which have occurred or rights and obligations which existed before the legislation's effective date. See Walker State Bank v. Chipokas, 228 N.W.2d 49, 51 (Iowa 1975).

If the governing board in question has commenced advertising for bids in accordance with N.D.C.C. ch. 48-02 (which Senate Bill No. 2418 amends) prior to July 12, 1989, Senate Bill No. 2418 could not be applied to the bidding process without violating the rule against retroactive application of legislation set forth in N.D.C.C. § 1-02-10.

Accordingly, it is my opinion that Senate Bill No. 2418 does not apply to projects that are already in the bid advertisement stage as of July 12, 1989. The advertisement for bids under those circumstances should contain the requirements currently set forth in N.D.C.C. § 48-02-04 and the contract should be awarded to the "lowest and best bidder," N.D.C.C. § 48-02-06. If the governing board does not commence advertising prior to July 12, 1989, the provisions of Senate Bill No. 2418 would apply to the competitive bidding process.

Your second question is whether a water treatment plant is a public building subject to N.D.C.C. ch. 48-02. N.D.C.C. ch. 48-02 requires a governing board to advertise for competitive bids "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," N.D.C.C. § 48-02-02, when the estimated cost of the work exceeds \$50,000.00. N.D.C.C. §§ 48-02-02, 48-02-03. N.D.C.C. ch. 48-02 does not define the term "building."

The North Dakota Supreme Court has interpreted N.D.C.C. ch. 48-02 as having a broad application. For example, in Northern Improvement Co. v. State, 213 N.W.2d 885, 887 (N.D. 1973), the court held that there was no dispute that the repair of a broken sewer line, which went under the Heart River and 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. See also letter from Attorney General Spaeth to Jerald L. Engelman, (January 7, 1985) (the discussion assumes that a water treatment plant is subject to N.D.C.C. ch. 48-02).

Applying the legal precedent discussed above to the question at hand, it is my opinion that a water treatment plant would constitute a public building subject to the competitive bidding provisions of N.D.C.C. ch. 48-02.

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

Sincerely,

Nicholas J. Spaeth
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