

Date Issued: July 27, 1981 (AGO 81-77)

Requested by: Vernon Fahy, State Engineer

- QUESTION PRESENTED -

Whether the activities of an engineering firm which does not have a certificate of authorization to practice engineering pursuant to chapter 43-19.1 of the North Dakota Century Code in submitting study proposals and participating in interviews with a selection committee for the purpose of seeking an engineering study contract with the State Water Commission, constitute an "offer to practice professional engineering" in violation of chapter 43-19.1, N.D.C.C.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the question presented is a question of fact and not a question of law. Therefore, this question must be decided by the State Water Commission or, in the event of litigation, the trier of fact in accordance with the proper legal standards expressly or implicitly set forth in chapter 43-19.1, N.D.C.C.

- ANALYSIS -

Pursuant to section 54-12-01(6), N.D.C.C., the Attorney General is to furnish written opinions on all legal or constitutional questions relating to the duties of state officers. This provision has uniformly been interpreted by this office to restrict the questions which may be answered by an opinion to questions of law. In this instance, the question of fact as to whether the activities involved were in compliance with the law must be initially decided by the State Water Commission. If litigation ensues, questions of fact must then be addressed by the trier of fact, be it the judge or jury. Accordingly, to the extent a question of fact is presented to the Attorney General, the Attorney General cannot express an opinion but can only set forth the legal issues which should be considered by a factfinder.

Section 43-19.1-01, N.D.C.C., provides as follows:

43-19.1-01. GENERAL PROVISIONS. In order to safeguard life, health, and property, and to promote the public welfare, the practice of engineering and land surveying in this state is hereby declared to be subject to regulation in the public interest, and it hereby is declared necessary that a state board of registration for professional engineers and land surveyors be established, which in the exercise of its powers shall be deemed to be an administrative agency within the purview of chapter 28-32. It shall be unlawful for any person to practice, or to offer to practice, professional engineering or land surveying in this state, as defined in the provisions of this chapter, or to use in connection with his name or otherwise assume, or advertise any title or description tending to convey the impression that he is an engineer or land surveyor, unless such person has been duly registered

or exempted under the provisions of this chapter. The right to engage in the practice of engineering or land surveying shall be deemed a personal right, based on the qualifications of the individual as evidenced by his certificate of registration, which shall not be transferable.

Subsection 4 of section 43-19.1-02, N.D.C.C., provides in part as follows:

A person shall be construed to practice or offer to practice engineering, within the meaning and intent of this chapter, who practices any branch of the profession of engineering . . . or who holds himself out as able to perform, or who does perform any engineering service or work or any other service which is recognized as engineering, for a valuable consideration for others including the public at large . . .

Licensing statutes, such as those involved here, represent substantial impingements on the constitutional freedoms of speech and the pursuit of a lawful occupation. Recognizing the need to protect the public welfare or safety, courts have generally upheld such licensing statutes as within the police power of the state. See, for example, State Board of Architecture v. Kirkhim, Michael, 179 N.W.2d. 409 (N.D. 1970). However, as an exercise of police power, licensing statutes must be reasonable. It is possible that a licensing statute which prohibits an out-of-state firm from entering into discussions preliminary to any contract negotiations with a prospective client may be an unreasonable restriction upon that firm's constitutional rights. It is also possible that such an application, which would prohibit an out-of-state firm from taking any steps to procure contracts within this state without first obtaining a certificate of authority, may constitute an unconstitutional restraint on interstate commerce.

We also note that the stated purpose of chapter 43-19.1, N.D.C.C., is to "safeguard life, health, and property, and to promote the public welfare." In 58 Am. Jur.2d., Occupations, Trades and Professions, Section 20 at p. 915, it is stated:

The prohibitions of a statute requiring one performing services as an engineer to be licensed are no broader than its purpose in protecting the public from misrepresentation and deceit; the scope of the statute coincides with the reasons for its existence.

That reasoning has been used by several courts to justify activities which were seemingly in violation of licensing statutes. In Kenroy v. Braves, 300 S.W.2d. 568 (Ky. 1957), it was held that an unlicensed engineer may enforce a contract with a licensed engineer in spite of the general rule that contracts entered into by unlicensed engineers are void and unenforceable. The court noted that no reliance was placed upon the existence of a license. A similar holding was reached in Costello v. Schmidlin, 404 F.2d. 87 (Third Cir. 1968). In Dick Weatherston's A.M. Service v. Minnesota M.L.I. Company, 100 N.W.2d. 819 (Minn. 1960), it was held that a contract for the installation of air-conditioning equipment which involved elements of engineering did not violate a licensing statute where the parties clearly understood that the contractor was not a licensed engineer and it

was further understood that plans and specifications would be approved by an architect and engineer retained by the other party.

Regardless of whether the firm has offered to practice engineering, the following provisions of section 43-19.1-28, N.D.C.C., must be considered:

43-19.1-28. PUBLIC WORKS. This state and its political subdivisions, including counties, cities, townships and legally constituted boards, districts, commissions, or authorities, shall not engage in the construction of public works involving the practice of professional engineering as herein defined when the contemplated expenditure for the project shall exceed the sum of five thousand dollars, unless the engineering drawings and specifications and estimates have been prepared by, and the construction is executed under the supervision of, a registered professional engineer. Any engineering contract executed in violation of this section shall be null and void.

This section prohibits the State Water Commission from entering into a contract with the firm unless the firm is properly certified at the time the contract is entered into. Any contract entered into prior to that time will be null and void.

- EFFECT -

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

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