

LETTER OPINION
94-L-273

October 17, 1994

Mr. James D. Gion
Hettinger County State's Attorney
P.O. Box 101
Regent, ND 58650-0101

Dear Mr. Gion:

Thank you for your letter requesting my opinion on three separate questions dealing with the construction of county roads.

In your first question you ask whether counties, as municipal governments, are prohibited from engaging in road construction in their respective counties. As used in the title of the code pertaining to highways, counties are not municipal governments. N.D.C.C. ? 24-01-29. In North Dakota, the power of a board of county commissioners to act in matters affecting county roads is predicated upon statute:

The boards of county commissioners in their respective counties have the sole authority and responsibility to acquire land for, construct, maintain, and operate the county road system as designated and selected by them.

N.D.C.C. ? 24-05-17; see also Umpleby v. State of North Dakota, 347 N.W.2d 156 (N.D. 1984).

Also, the Legislature has declared its intent to give the boards of county commissioners broad authority to construct and maintain the county road system. N.D.C.C. ? 24-01-01. Therefore, it is my opinion that counties have the statutory authority to build and maintain roads in the county road system.

In your second question you ask if the municipality that let a road construction project for bids can submit a bid in competition with private sector contractors.

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All contracts for the improvement of county highways exceeding fifteen thousand dollars must be let for bids. N.D.C.C. ? 24-05-04. Under this statute, a board of county commissioners solicits these bids in the same manner as provided for the purchase of county supplies. The purchase of county supplies is regulated by N.D.C.C. ? 11-11-27, et seq., and results in the formation of a contract with the successful bidder.

Words used in a statute are to be understood in their ordinary sense, unless a contrary intention plainly appears. N.D.C.C. ? 1-02-02. The word "contract" is defined as an "agreement between two or more parties, [especially] one that is written and enforceable by law." The American Heritage Dictionary 317 (2d coll. ed. 1991) (emphasis added). Thus, in requiring counties to contract for the improvement of a county highway, the Legislature contemplated an agreement between a county and at least one other party. N.D.C.C. ? 11-11-49.

One of the requirements of a contract under North Dakota law is that the parties are capable of contracting. N.D.C.C. ? 9-01-02. Since N.D.C.C. ? 24-05-04 requires a contract for the improvement of a highway to result from the bidding process, a county could only enter into a contract with the lowest and best bidder. It is axiomatic that an entity, of whatever nature, cannot contract with itself. Therefore, it is my opinion that a county could not be a bidder on a county highway project for which bids have been publicly solicited.

In your third question you ask if the North Dakota Highway Commissioner can withhold "Federal assistance to road" funds from a county by increasing the state requirements for approval of the project.

Despite the broad authority a county has to construct and maintain county roads, there are several federal regulations for constructing highways that are

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financed with federal aid. See 23 C.F.R. part 635(a) and (b). Basically, the general rule is that construction work shall be performed by contracts awarded through competitive bidding. An exception to this rule applies when the North Dakota Department of Transportation (NDDOT) demonstrates to the local administrator of the Federal Highway Administration (FHWA) that a force account or negotiated contract method is more cost effective or that an emergency exists. 23 C.F.R. ?? 635.104(a); 635.204(a). An alternative to competitive bidding may be cost effective when "there is a lack of bids or the bids received are unreasonable." 23 C.F.R. ? 635.205(a).

A request for this exemption from competitive bidding must describe the project, the kind of work to be performed, the estimated cost, the estimated federal funds to be provided, and the reason or reasons that competitive bidding is not cost effective. 23 C.F.R. ? 635.204(c). Further, the decision to seek this exemption rests with the director of the NDDOT. Id.

Before asking the FHWA to waive the public bidding requirement, the director of the NDDOT shall determine that financing the proposed project through force account or negotiated contract is cost effective. 23 C.F.R. ? 635.104(a). There are no "state requirements for approval of the project," as described in your letter. Rather, the decision to request a waiver depends on the facts of each project and is left to the discretion of the director of the NDDOT. Because this decision is based on facts instead of law, I cannot give you an opinion on this issue.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

meb/pg