

OPINION
50-20

June 9, 1950 (OPINION)

CITIES

RE: Electricity from Bureau of Reclamation

I am in receipt of your letter of May 29, 1950, in which you request information relating to a proposed contract to be entered into between the city of Lakota and the Bureau of Reclamation.

You state that the Bureau of Reclamation has offered to sell electricity to the city-owned municipal light plant at a price much lower than the plant is able to produce its own electricity. The source of the electricity is to be the Missouri River Basin Project.

Your first question is:

(1) May a council form of city government enter into such a contract?"

Section 40-3301, N.D.R.C., 1943, provides:

ELECTRIC LIGHT, TELEPHONE, AND POWER PLANTS: MUNICIPALITIES MAY PURCHASE, ERECT, MAINTAIN, SELL, OR LEASE. Any municipality may purchase, erect, operate, maintain, enlarge, improve and extend or lease from any person, firm, or corporation, or sell or lease to any person, firm, or corporation:

1. Any electric light and power plant, site, buildings, and equipment thereof;
2. Any electric distribution system and equipment thereof;
3. Any electric transmission line and equipment thereof;
4. Any telephone plant, equipment, and distribution system thereof;
5. Any waterworks, mains, and water distribution system and any equipment or appliances connected therewith; and
6. Any heating system, gas or otherwise, and the buildings and equipment necessary to furnish heat to the public buildings of the municipality and to the inhabitants of the municipality."

We are unable to find any code provision which specifically permits the purchase of electricity by a municipal light plant from a federal agency. However, we do not believe that such a provision is necessary in view of the words used in the above-quoted section. That section provides that any municipality may "operate and maintain" a light and power plant and distribution system.

It is the opinion of this office that the words "operate" and "maintain," by necessary implication, mean that the municipal light plant may carry on its operations in the manner which is most advantageous to the municipality, and which will result in the efficient distribution of electrical energy.

If the municipal light plant can, in the opinion of the governing body, best accomplish these objectives through the purchase of electricity from some outside source (rather than generate its own electricity), we see no reason why this may not be done and a contract entered into for that purpose.

Your second question is:

(2) Will it be necessary that the proposition of entering into such a contract be submitted to a vote of the people?"

Section 40-3302, N.D.R.C., 1943, provides:

"ACQUIRING, ERECTING, OR IMPROVING PLANT, SYSTEM, OR LINE WITHOUT ELECTION PROHIBITED; EXCEPTION. No municipal officers shall purchase, erect, nor substantially enlarge, improve, or extend an existing plant, nor lease from others any plant, system, or line provided for in section 40-3301, unless the proposition shall have been submitted by a resolution of the governing body to the qualified electors of the municipality at an annual or special election called, held, and conducted upon the notice and in the manner specified by this title for the election of the governing body of the municipality, and shall have been approved by a majority of the electors voting thereon. If, however, the cost of any enlargement, improvement, or extension will be paid out of the earnings of the plant and the cost does not exceed the sum of five thousand dollars, it shall be unnecessary to submit the proposition to the electors of the municipality."

The proposed contract for the purchase of electricity from the Bureau of Reclamation does not involve the acquisition of additional plant facilities or the extension of the system or lines, but is, rather, a problem of internal management and operation. For these reasons it is the opinion of this office that the governing body of the municipality may act upon its own authority to manage and operate the light plant without submitting the question to the voters.

However, it is my understanding that the municipality will be required to extend its lines somewhat in order to pick up the electricity furnished and bring it into the municipal light plant. This, of course, may require approval by the voters unless the cost of such an extension will be paid out of earnings and will not exceed \$5000.00

Your final question is:

(3) I notice that the proposed contract does not specifically state that payment for current shall be made from earnings in the resale of current by the city. Should the terms of the contract not be changed so as to provide that payment to the

government should be made solely from the net earnings from the resale of current by the city?"

Sections 40-3310 and 40-3311, N.D.R.C., 1943, provide as follows:

MUNICIPAL UTILITIES FUND: CONTENTS; KEPT SEPARATE FROM OTHER FUNDS; USE AND DISBURSEMENT. All money received by a municipality for the service of any utility owned and operated by the municipality, and all money, receipts, and returns received from any investments of the earnings of such utilities, shall be paid into the treasury of the municipality and kept in a fund known as the municipal utilities fund. All of the moneys, earnings, and receipts deposited in such fund shall be kept separate and distinct from all other funds of the municipality until used. The fund shall be used only for the purposes and disbursed only in the manner provided by this chapter."

PAYMENTS OUT OF MUNICIPAL UTILITIES FUND; LIMITATIONS. Upon proper orders or warrants issued upon the authority of the governing body of the municipality, there shall be paid out of the municipal utilities fund all sums necessary for the operation, maintenance, enlargement, repair, alteration, improvement, and extension of the plant or plants of which the earnings go into the fund, but no municipality shall pay out of nor divert from the fund any sum for any other purpose except as provided in section 40-3312."

These sections do not prohibit the municipalities from keeping a separate system of accounts within the municipal utilities fund for each municipal utility. In fact, we believe that such a division is called for as a matter of sound accounting procedure, and that should this proposed contract be entered into that the cost of electricity furnished should be paid for out of current earnings.

However, we do not believe that it is necessary for such a provision to appear in the contract with the Bureau of Reclamation, as it is a matter of internal management and should be provided for by the governing body in its operation of the light plant.

I hope that we have been of some help to you in this matter, and if there is any further assistance which we can give you, please feel free to write us.

WALLACE E. WARNER

Attorney General