

Opinion No. 51-5426

September 18, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Hon. Paul A. Tackett District Attorney Second Judicial District County Court House Albuquerque, New Mexico

{*131} You have asked this office if the Board of County Commissioners of Bernalillo County, in connection with the proposed construction of a hospital, may pay the salaries of payroll clerks who supervise the time and labor of workers upon the project. It appears that the salaries {*132} of such clerks would be paid out of the proceeds of a bond issue defraying the cost of construction of such hospital. It appears further that the County proposes to construct such hospital, purchasing all materials and paying for all labor, and paying a flat fee to a building or construction firm to supervise construction.

The question arises whether the use of such funds to pay such payroll clerks would offend Section 9 of Article IX of the State Constitution. In an opinion, dated April 1, 1949, this office informed you that Section 9 of Article IX of the Constitution did not prohibit the County from paying necessary attorney's fees incurred in connection with the issuance of such bonds. Such a power was held to be an implied power which is to be inferred from the general scope of the actual power to issue bonds.

I am of the opinion that the constitutional provision does not prohibit the use of such funds to pay the salaries of payroll clerks, timekeepers, etc., of all workers upon the job if the County is actually doing the construction work itself and paying for the labor and materials on the project, no more than it would prohibit the payment of the costs of labor and material upon the job. This presupposes that the County is doing the work itself and since the employment of payroll clerks would be necessary, the expenditure of funds from the proceeds of the bond issue would be no less proper than the expenditure of those funds for the cost of work and materials purchased in connection with such project. Conversely, the use of such funds would be prohibited by the Constitution if the County is not actually constructing the building itself.

Of necessity the County would be under an obligation to comply with the Public Purchases Act so far as the purchase of any materials is concerned.

You next ask whether a contract, which was executed between the county commissioners and the lowest bidder, in response to advertising, soliciting bids for the construction of the hospital, which would provide for the construction of the hospital by the lowest bidder upon a "flat fee" basis whereby the County would pay for labor and materials, to be purchased by it, and pay a supervising fee to the builder fully complies with the Public Purchases Act, Chap. 6-401, et seq.

It appears that in response to the advertising soliciting bids for the construction of the project, bids were obtained but that all of the bids were in excess of the monies available for the construction of the hospital. It appears that thereafter the Board of County Commissioners negotiated with the lowest bidder for the construction of the hospital upon the basis of paying it a flat fee to supervise the work under an arrangement whereby the County would purchase all materials and pay for all labor.

The effect of accepting no bids for the project, as advertised, amounted to the same thing as rejecting all bids. The effect of then letting the contract to the lowest bidder, after negotiation, amounted to letting the contract for the construction of the hospital upon the basis of terms and specifications different than those contained in the advertisement soliciting bids for said construction or amounts to entering into a new contract for the construction involving the expenditure of more than \$ 500 without competitive bidding. The first alternative, namely, that of letting the bid to the lowest bidder upon terms different than those contained in the advertising soliciting bids for the construction of the hospital is forbidden by Chap. 6-401 et seq., in particular § 404, N.M.S.A.

Your attention is respectfully called to a statement appearing in 43 Am. Jur. 46, under the topic '**Departure from terms of advertised plans and specifications; modifying terms after bids are in.**':

{*133} "After bids have been made upon the basis of plans and specifications prepared by public authorities and given out to all interested bidders, no material or substantial change in any of the terms of such plans or specifications will be allowed without new advertisement giving all bidders opportunity to bid under the new plans and specifications. Public authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications on which bids were invited; the contract which they execute must be the contract offered to the lowest responsible bidder by advertisement, and any contract entered into, containing substantial provisions beneficial to the bidder which were not included in the specifications, is void. Any other course would prevent real competition, lead to favoritism and fraud, and defeat the purpose of the law in requiring contracts to be let upon bids made upon advertised specifications. A contract let upon the basis of anything else than the advertised plans and specifications would be one let without the competitive bidding which is necessary to give it validity."

The second alternative, namely, letting a new contract for the construction of a building involving the expenditure of more than \$ 500 is permissible without bidding only upon the purchasing agent, in this case, being the Board of County Commissioners of Bernalillo County, first securing the written approval of the State Board of Finance.

I trust that this fully answers your inquiry.