Opinion No. 58-162

August 1, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr., Assistant Attorney General

TO: Mr. B. V. Roberts, Acting State Purchasing Agent, Capitol Building, Santa Fe, New Mexico

QUESTION

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§ 74-1-11, N.M.S.A., 1953 Compilation, 1957 P.S. provides for a blanket bond to be posted by the Veterans' Service Commission to insure the faithful discharge of the Commission's duties as Executor, Administrator or Guardian for persons or estates for whom the Commission is appointed to act. The insurance company which has written the said blanket bond is now attempting to cancel the bond. In view of the foregoing can

(1) The insurance company cancel its bond or is it bound until relieved by the courts?

(2) If it can cancel the bond is it:

(a) under a duty to secure a replacement bonding company satisfactory to the State Purchasing Agent, the Veterans' Service Commission and the courts in the various guardianship and estate proceedings?

(b) In the event it is not under obligation to secure a replacement, is it liable to the State for the expense involved in securing a replacement, i.e., petitioning all of the courts in all the guardianship and estate matters

(c) If it can cancel the bond and if the State can secure another bonding company to take the bond but at a higher rate, is Anchor Casualty Company liable for the difference between the price bid by Anchor Casualty Company and the price of replacement?

(d) Since the bond is continuous in form with annual payments, are the unsuccessful bidders of approximately a year ago still bound on their bid in the event Anchor Casualty Company can cancel the bond?

(e) If the unsuccessful bidders are not bound by their previous bid, can the Purchasing Agent, in the case of a continuing bond of this nature, then advertise for and secure new bids on the bond?

CONCLUSIONS

(1) Yes, subject to the provisions of termination contained in the insuring contract.

(2) (a) No.

(b) Yes.

(c) No.

(d) No.

(e) Yes.

OPINION

ANALYSIS

We are informed that the contract entered into between the State of New Mexico and the insurance company provided for one year coverage with an option to extend the coverage from two to ten years. The State apparently elected to be covered for one year by the payment of an annual premium although apparently the agent for the insurance company and the purchasing office orally agreed that the policy should be renewed on a year to year basis at the bid rate. The insuring agreement also contained the following provisions:

"This bond may be canceled as to future liability by either the Principal or Surety upon Ninety (90) days written notice, and in addition as otherwise provided by law, by registered mail to the other party,

PROVIDED HOWEVER, such cancellation shall not become effective, and this bond shall remain in full force and effect, until an adequate substitute bond in accordance with the provisions of said Chapter 176, Laws of New Mexico, 1957, shall be filed and become effective. Notice of cancellation by the Surety shall be addressed to the Principal at its office in Santa Fe, New Mexico. Notice of cancellation by the Principal shall be addressed to the Surety at its office hereinabove named."

The local agent for the insuring company recently informed the State Purchasing Agent that they wish to cancel the bond. Their reasons for doing so are quite simple. Notwithstanding that there is little or no risk involved in this type of coverage the National Association of Insurance Underwriters, of which the instant insurance company is a member has arbitrarily set the premium rate for the writing of this bond at $ 5,000 per year. As a member of the National Association of Insurance Underwriters, the present insurance company is forced to accept the association's manual rate although the $ 5,000 yearly premium referred to represents an increase of approximately 500% over the original bid initially submitted to the State Purchasing Agent.

In view of the foregoing, we are asked whether the insurance company which is now providing the bond, may cancel their bonding obligation. We are of the opinion that they may do so subject to the provisions of the insuring contract. As we previously pointed out above, the insurance company must give cancellation in writing ninety days before termination of the policy. Such cancellation however is not effective unless and until an adequate substitute policy in accordance with the provisions of Chapter 176, Laws of New Mexico, 1957, shall be filed and become effective.

Although we believe that the present insurance company is under a duty to provide insurance until a replacement is secured we do not believe that the company is under a duty to secure such a replacement bonding company. No specific provision to that effect is contained in the insuring agreement, nor is such intent expressed in the policy as a whole. So long as the present company maintains their protection while a replacement is being secured, we believe that they meet the provisions and the intent of the insuring contract.

It is apparent that the State will be involved possibly in petitioning the various courts to allow replacement of the present bond and substituting a new bond. We are of the opinion that this expense, although it will probably be nominal, can and should be assessed against the present bond holder.

We are of the opinion that the present bond holder would not be liable for any difference in price which might be incurred by the state in replacing the present bond holder. Certainly, such an obligation was not contemplated in the contract itself and we do not believe that it would be fair or equitable to attempt to assess the additional price in premium rate against the present bond holder. We are informed that several companies bid on the original bond which is now in effect. The question then arises whether unsuccessful bidders of approximately one year ago are still bound on their bid in the event the present bond holder cancels his bond. We are of the opinion that they are not so bound. Their bid constituted an offer made approximately one year ago and no contract was consummated with these companies inasmuch as their offer was not accepted within a reasonable period of time. As contemplated by the offer to bid made by the Purchasing Agent inasmuch as their bid or offer was not accepted at a reasonable time, we know of no way in which such bidders could now be bound.

By way of conclusion, it is our opinion that the Purchasing Agent should advertise and attempt to secure new bids on this bond after receipt of a "termination notice" from the present bond holder. The provisions of the present bond provide that the present bond remains in full force and effect until an adequate substitute shall be filed and become effective. We believe that the Purchasing Agent is under an obligation certainly to attempt to secure such replacement at an early date if possible in order to conform with the contract provisions of the bond. Since we have previously held that insurance must be obtained on a bid basis, bids will be required.