

## **Opinion No. 64-36**

March 23, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General James E. Snead, Assistant Attorney General

**TO:** Mr. Dante Vaio, State Purchasing Agent, State Capitol Santa Fe, New Mexico

### **QUESTION**

#### QUESTION

Is a resident bidder on a contract for pest control service to a state agency entitled to resident preference under Section 6-7-14, N.M.S.A., 1953 Compilation as Amended?

#### CONCLUSION

No.

### **OPINION**

#### ANALYSIS

The New Mexico State Purchasing Agent issued an invitation to bid for a contract to provide "Pest Control Service, for the period of January 1, 1964 through December 31, 1964" to the Carrie Tingley Hospital in Truth or Consequences, New Mexico. The invitation mentioned only the services to be performed under the contract, but did not mention whether goods or merchandise were to be included in the contract. However, it is assumed that it will be necessary for the successful bidder to supply certain goods, such as poison, incidental to providing the service requested. The contract is, however, primarily one for services. Orkin Exterminating Company, Inc., a foreign corporation authorized to do business in New Mexico submitted the low bid. Orkin has a place of business in New Mexico, operating under the control and supervision of the parent corporation, which business pays the same New Mexico taxes as does any similar foreign corporation licensed to do business in New Mexico.

Although the low bid was submitted by Orkin, if a second company were given a five percent preference under Section 6-7-14, N.M.S.A., 1953 Compilation as Amended, while Orkin was not, then the low bidder would not be Orkin. The bid in the present case was submitted by the El Paso Office of Orkin rather than the Albuquerque office.

Under these facts, two questions are presented. The first question is whether the resident preference statute mentioned above applies to contracts primarily for services as opposed to goods or merchandise. The second question is whether Orkin is entitled to resident preference.

Since it is our opinion that Section 6-7-14, supra, does not apply to a contract of the present type, it will not be necessary to answer the second question.

Section 6-7-14, supra, provides as follows:

"6-7-14. Resident preference. -- Whenever bids are received on goods manufactured or processed wholly within this state in competition with bids on goods manufactured elsewhere, the goods manufactured or processed wholly in this state shall be preferred, whenever the price therefor does not exceed, by a difference of five percent (5%) the bid for such goods manufactured or processed outside of the state.

A bid received from a resident distributor or retailer, that is, a distributor or retailer maintaining in the regular course of business, a merchandise inventory within the state upon which ad valorem taxes are paid, the bid from the resident shall be preferred unless a bid from a nonresident is more than five percent (5%) lower."

This office stated in Attorney General's Opinion No. 62-94 that the resident preference did not apply to bids tendered in response to an invitation for bids for the construction of Ute Dam near Logan, New Mexico. The theory behind that opinion was that a contract to construct a dam was one for services as opposed to one for goods manufactured or processed within the state. Even though some materials will of necessity be consumed by the contractor in the course of providing services, these materials were construed not to be "goods" as contemplated by the legislature in enacting the above quoted statute. The primary intent of the invitation for bids issued in the instant case was to provide services, and not to supply "goods manufactured or processed wholly within this state."

It is our opinion that the second paragraph quoted above does not apply in the present situation since that section relates to distributors or retailers of **merchandise**, whereas the present contract deals almost entirely with **service**.

It is our opinion that Section 6-7-14, supra, does not apply to the contract in this case, and that no one is entitled to a resident preference. Therefore, Orkin is the low bidder on the contract.