

Opinion No. 71-32

February 25, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. William Henry Mee Attorney New Mexico Legislative Council 334 State Capitol
Santa Fe, N.M. 87501

QUESTIONS

QUESTION

Can a city require contractors to post a surety bond as a prerequisite for registration to do contracting work?

CONCLUSION

Yes.

OPINION

{*47} ANALYSIS

The Municipal Code, Chapter 14, N.M.S.A. 1953 Comp., contains no statute specifically authorizing cities to require surety bonds of contractors. Cities do have broad police powers under Sections 14-16-1 and 14-17-1. Section 14-16-1 provides:

"Ordinances -- Purposes. -- The governing body of a municipality may adopt ordinances or resolutions not inconsistent with the laws of New Mexico for the purpose of:

A. Effecting or discharging the powers and duties conferred by law upon the municipality;

B. Providing for the safety, preserving the health, promoting the prosperity, improving the morals, order, comfort and convenience of the municipality and its inhabitants; and

C. Enforcing obedience to the ordinances by imposing fines not exceeding ninety [90] days by suit or prosecution before the municipal judge of the municipality, or by both such fine and imprisonment."

Section 14-17-1, which enumerates the general powers of a municipality, provides that a municipality may:

"Protect the property of its municipality and its inhabitants; and

Preserve peace and order within the municipality."

New Mexico's courts have interpreted these statutes as conferring "general welfare" and "police" powers on the municipality. **City of Hobbs, v. Biswell**, 81 N.M. 778, 473 P.2d 917, (Ct. App. 1970).

An ordinance is a proper exercise of the police power "only if the enactment is reasonably necessary to prevent manifest or anticipated evil, or is reasonably necessary to preserve the public health, safety, morals, or general welfare." **City of Hobbs, v. Biswell, supra**. A surety bond requirement is designed to protect the creditors of contracting companies. Protecting creditors encourages business activity and clearly preserves the general welfare. A surety bond requirement is reasonably necessary to accomplish the purpose; consequently, an ordinance requiring surety bonds of contractors is a proper exercise of the city's police power.

A municipal ordinance must pass one other test to be valid. Section 14-16-1 allows the municipality to adopt only those ordinances "not inconsistent with the laws of New Mexico." Sections 65-35-56 and 65-35-57 of the Construction Industries Licensing Act require a surety bond as a requirement for a contractor's license. Sections 65-35-56, 57, N.M.S.A. 1953 Comp. (1969 P.S.). A city ordinance requiring a surety bond does impose an additional burden on the contractor. This is not sufficient to make the ordinance inconsistent with the state law.

"An ordinance . . . is not necessarily inconsistent with a state law on the same subject because it provides for greater restrictions or prescribes higher standards than the law." **City of Hobbs v. Biswell, supra**.

The question is whether the additional requirements of the ordinance conflict with the statute. **City of Hobbs, v. Biswell, {48} supra**. Municipal ordinances requiring surety bonds do not conflict with state laws imposing the same requirement; instead, they complement the purpose of the state law, which is to prevent financially irresponsible contractors from doing business in the state. We conclude, then, that municipalities can require contractors to post surety bonds.

By: Thomas Patrick Whelan

Assistant Attorney General