

Opinion No. 88-68

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OPINION OF: HAL STRATTON, Attorney General

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QUESTIONS

Does Section 1-9-14 NMSA 1978 bar application of the Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978, to the purchase of internal computers used to record and tabulate votes?

CONCLUSIONS

No.

ANALYSIS

Section 1-9-14 NMSA 1978 provides:

A. Notwithstanding any other provision of the Election Code [this chapter], the secretary of state shall provide for the testing and evaluation of internal computers designed for the purpose of recording and tabulating votes within polling places in New Mexico. Any person who has an internal computer which is designed for the purpose of recording and tabulating votes within a polling place may apply on or before June 1, 1983 to the secretary of state to have his equipment examined and tested. At the time application is made, the applicant shall pay to the secretary of state an examination fee of one thousand dollars (\$1,000). Upon receipt of the application and examination fee, the secretary of state shall examine and study the computer voting machine. As part of the examination, the secretary of state shall require the machine to be independently inspected by persons or testing laboratories technically qualified to evaluate and test the operation and component parts of an internal computer for recording and tabulating votes and shall require a written report on the results of such testing. The application fee shall be used to pay for the cost of such testing. In addition, the secretary of state shall authorize field testing of the equipment in one or more precincts in any state or local government election, provided that such field tests shall be conducted at no cost to the state or any local government.

B. Upon completion of all tests and examination of all written test reports, the secretary of state shall make a written report of the result of the findings and of the secretary of state's recommendations regarding the suitability and reliability of the use of such

equipment in the conduct of elections under the Election Code. Such report shall be a public record.

C. If the findings of the secretary of state show that the internal computer for recording and tabulating votes is suitable for use in polling places for the conduct of elections in New Mexico, such equipment shall be deemed approved for use in elections in this state.

D. In the event the secretary of state approves the use of internal computers for use in polling places for the conduct of elections in New Mexico, then, in that event, the secretary of state shall prescribe by regulation promulgated under the provisions of the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978] specifications for internal computers designed for the purpose of providing for a uniform system of internal computers of recording and tabulating votes within polling places, which specifications shall have as their primary purpose the securing of the secrecy of the ballot, protecting against fraud in the voting process, preserving in all respects the purity of elections, facilitating voting by the voters of this state and carrying out the provisions of the Election Code with respect to the administration of the conduct of elections in New Mexico.

(Emphasis added.) Section 1-9-14 NMSA 1978 became effective on April 6, 1983. 1983 N.M. Laws, ch. 226, § 2. The Secretary of State is responsible for testing and approving mechanical lever voting machines as well. See Sections 1-9-1 and 1-9-2 NMSA 1978. The question is whether the June 1, 1983 deadline for applying to have computer voting machines examined and tested effectively restricts the machines available for purchase and use¹ to those examined and tested by the deadline. Section 1-9-2 NMSA 1978 contains no deadline for examining and testing mechanical lever voting machines.

Section 1-9-14 NMSA 1978 was the first legislative enactment that authorized the use of computer voting machines in New Mexico. It mandated the Secretary of State to take certain steps before they could be used. Subsection A provides that persons could apply on or before June 1, 1983 to have internal computers designed for recording and tabulating votes examined and tested. The Secretary of State was directed to have the equipment inspected and receive a written report of the results. Subsection B required the Secretary to make a written report with her recommendations about the use of computer voting machines after completion of all tests and examination of the written test reports. Subsection C states that if the Secretary found that computer voting machines were suitable for use in elections, then "such equipment shall be deemed approved for use in elections in the state." Subsection D provides that in the event the Secretary approves the use of internal computers for use in elections, then she must prescribe by regulation specifications for computer voting machines.

We must construe each part of Section 1-9-14 NMSA 1978 with every other part so as to produce a harmonious whole. *State ex rel. Maloney v. Neal*, 80 N.M. 460, 462, 457 P.2d 708, 710 (1969). If we construe Subsection A so that the Secretary could examine and test only the equipment of those persons who applied by June 1, 1983 to have that

equipment examined and tested,² then Subsection D's requirement that the Secretary prescribe specifications is superfluous, as the equipment tested pursuant to Subsection A already would be approved pursuant to Subsection C and no additional equipment could be examined and tested. The legislature is presumed to have used no surplus words. *Cromer v. J.W. Jones Constr. Co.*, 79 N.M. 179, 184, 441 P.2d 219, 224 (Ct.App. 1968) ("It is fundamental that a statute should be so construed that no word, clause, sentence provision or part thereof shall be rendered surplusage or superfluous.") The statute became effective less than two months before the June 1, 1983 deadline. To produce a "harmonious whole" and to avoid creating surplusage, we must construe the deadline in Subsection A as the date for the Secretary to begin the process of determining the desirability of allowing the use of computer voting machines in the State. Persons who had their machines tested before that date could have an input in that determination. Subsequent to that date, approval of internal computers would be based on the specifications promulgated pursuant to Subsection D.

If we construe the June 1, 1983 deadline in Subsection A as restricting the state's purchase of computer voting machines to those examined and tested by the deadline, the statute also would effectively eliminate competition among voting machine vendors. Such a construction would favor the private interest of vendors who met the deadline over the public interest of maximizing the purchasing value of public funds. We should avoid such a construction. The New Mexico Supreme Court has stated in *City Comm'n of Albuquerque v. State ex rel. Nichols*, 75 N.M. 438, 445, 405 P.2d 924, 931 (1965): "Statutes should be construed in the most beneficial way of which their language is susceptible to prevent absurdity, hardship or injustice, to favor public convenience, and to oppose all prejudice to public interests." Similarly, the Colorado Supreme Court in construing a statute stated: "[W]e must presume that the legislature intended a just and reasonable result when it enacted this statute, a result which favors the public interest over any private interest." *Allen v. Charnes*, 674 P.2d 378, 381 (1984).

The Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978, applies to all contracts solicited or entered into after November 1, 1984. Section 13-1-30 NMSA 1978 states, in part: "Except as otherwise provided in the Procurement Code, that code shall apply to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction." Section 13-1-93 NMSA 1978 defines "tangible personal property" as "tangible property other than real property having a physical existence, including but not limited to supplies, equipment, materials and printed materials." When the Legislature enacted Section 1-9-14 NMSA 1978 in 1983, the Procurement Code was not in effect. However, the Legislature did not exempt the purchase of voting machines from the provisions of the Procurement Code, see Section 13-1-98 NMSA 1978, and Section 13-1-29 NMSA 1978 states:

A. The Procurement Code shall be liberally construed and applied to promote its purposes and policies.

B. All references in law to the Public Purchases Act shall be construed to be reference to the Procurement Code.

C. The purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity.

For these reasons, we conclude that the Procurement Code applies to the purchase of internal computers used to record and tabulate votes after November 1, 1984.³

ATTORNEY GENERAL

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GENERAL FOOTNOTES

[n1](#) Section 1-9-17 NMSA 1978 provides that counties shall purchase voting machines from the state board of finance under lease-purchase contracts.

[n2](#) We understand that only one person made application between April 6, 1983 and June 1, 1983 for the examination and testing of computer voting machines.

[n3](#) The specifications that the Secretary of State prescribes pursuant to Section 1-9-14D NMSA 1978, as well as those found in Sections 1-9-15 and 1-9-16 NMSA 1978, would be the specifications to which Section 13-1-89 NMSA 1978 refers: "'Specification' means a description of the physical or functional characteristics or of the nature of items of tangible personal property, services or construction. 'Specification' may include a description of any requirement for inspecting or testing, or for preparing items of tangible personal property, services or construction for delivery."