

**LETTER OPINION**  
**97-L-84**

June 18, 1997

Honorable George Keiser  
State Representative  
2959 Domino Drive  
Bismarck, ND 58501

Dear Rep. Keiser:

Thank you for your letter concerning the interpretation of North Dakota Century Code (N.D.C.C.) § 48-01.1-06. The issues you raise are as follows:

The first issue is whether the bid for the entire project exceeds the defined limit (currently \$50,000 but soon to be \$100,000) or the bid for any required element (general, electrical or mechanical) exceeds the defined limit. For example, on a \$200,000 project wherein the electrical component is \$42,000, is the political subdivision required to write appropriate bid specs for the electrical component and then accept bids on that subsection which would be submitted by electrical contractors not included in the general contractor's bid?

A second issue deals with general contractors "imbedding" cost elements within categories. For example, in a bid for a golf course, a general might include in the specs for landscaping, the various motors and electrical pumps required for irrigation. The landscaping contractor would then subcontract with an electrical contractor to do the work which may legitimately exceed the \$50,000 or \$100,000 limit.

N.D.C.C. § 48-01.1-06 provides:

Multiple prime bids for the general, electrical, and mechanical portions of a project are required when any individual general, electrical, or mechanical contract is in excess of fifty thousand dollars. The governing body may also allow submission of single prime bids or bids for other portions of the project at its discretion. The governing body may not accept the single prime bid unless

Honorable George Keiser  
June 18, 1997  
Page 2

that bid is lower than the combined total of the lowest and best multiple bids for the project.

(Emphasis added.)

The North Dakota Supreme Court in Milbank Mut. Ins. Co. v. Dairyland Ins. Co., 373 N.W.2d 888, 891-92 (N.D. 1985) (citations omitted), summarized the rule of statutory construction as follows:

[O]ur duty is to ascertain the intent of the Legislature. The Legislature's intent must be sought initially from the language of the statute. If a statute is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit because the Legislative intent is presumed clear from the face of the statute. However, if the language of a statute is ambiguous or of doubtful meaning, the court may resort to extrinsic aids to interpret the statute.

I have reviewed the first sentence of N.D.C.C. § 48-01.1-06 and find it clear and unambiguous. This provision requires multiple prime bids for the general, electrical, and mechanical portions of a project whenever any individual portion is in excess of \$50,000. I understand that a contrary interpretation is posed to the effect that a multiple prime bid for a portion of the project is required only when the cost of that portion exceeds \$50,000. However, this interpretation ignores the plain meaning of the term "and" as a conjunction in the first sentence of the statute and would treat the term as a disjunctive "or."

I have reviewed the general bidding process outlined under N.D.C.C. ch. 48-01.1 and find that there is nothing within that chapter that creates any latent ambiguity with the plain language of N.D.C.C. § 48-01.1-06. See Kroh v. American Family Ins., 487 N.W.2d 306, 308 (N.D. 1992) ("[S]tatutes that are clear and unambiguous when read separately may contain a latent ambiguity when read together and applied to a particular set of facts.").

N.D.C.C. § 48-01.1-06 was enacted in its present form during the 1995 Legislative Session. 1995 N.D. Sess. Laws ch. 443 [House Bill 1452]. In reviewing the legislative history of House Bill 1452, I understand that committee testimony plainly indicates a contrary interpretation was intended. See Hearings on HB 1452 Before the Senate Comm. on Political Subdivisions, 54th N.D. Leg. (March 17, 1995) (Tape 1, Side A). As introduced, House Bill No. 1452, relating to multiple prime bids, provided:

48-01.1-06. Bid requirements for public buildings. When applicable, a governing body shall allow a contractor to submit multiple prime bids for the general, electrical, and mechanical contracts for competitive bids for public buildings estimated to cost in excess of fifty thousand dollars. The governing body may also allow submission of single prime bids or bids for other portions of the project at its discretion. The governing body may not accept the single prime bid unless that bid is lower than the combined total of the lowest and best multiple bids for the project.

As proposed, multiple prime bids for the general, electrical, and mechanical contracts would have been required when the cost of any public building exceeded \$50,000. The City of Grand Forks supported House Bill 1452, but the following amendment and comment was offered:

2. Multiple prime bids for general, electrical or mechanical contracts should be required only when the estimated costs for any individual general, electrical or mechanical contract is in excess of \$50,000.00.

Explanation: The administrative costs for small multiple contracts under \$50,000.00 are excessive. Nearly as much time and effort goes into the process of administering a \$5,000.00 construction contract as a \$100,000.00 construction contract. These costs have to be absorbed by the municipality and passed on to our residents. An example would be a roofing project. The majority of the work is done by a roofing contractor (the general contractor) with the exception of the roof drains. A separate contract would have to be let to allow a mechanical contractor to bid a very minor part of the larger roof project. The mechanical contract could easily be for less than \$5,000.00, yet a separate contract would be required. In this example it would make more sense to allow the mechanical contractor to be a subcontractor to the general contractor and allow the municipality to bid only one project.

(Written Testimony of the city of Grand Forks) (emphasis added). The intent of the proposed amendment was to require a multiple prime bid for the general, electrical, or mechanical portions of the contract only when the estimated cost of the general, electrical or mechanical

contract was in excess of \$50,000. Id. (Testimony of Curt Peterson) (Tape 1, Side A). However, the amendment was drafted to provide that "[m]ultiple prime bids for the general, electrical, and mechanical portions of a project are required when any individual general, electrical or mechanical contract is in excess of fifty thousand dollars." Id. (Report of Standing Committee) (emphasis added). The committee testimony on the proposed amendment contemplated the word "or" between electrical and mechanical. However, the final result was that "and" was written instead of "or."

Because the Legislature is presumed not to perform idle acts, a latent ambiguity could be created if giving the term "and" its plain meaning would make the 1995 amendment meaningless. However, the term need not be interpreted as an "or" to give the amendment meaning; the plain language of the amendment made a substantial change in the bill. The bill as introduced reflected the law currently in effect and provided that multiple prime bids were required when the total cost exceeded \$50,000. Under the amendment, each of the three component parts of a project could equal \$50,000, for a total cost of \$150,000, and multiple prime bids would not be required. Although a governing body's authority under this interpretation of the amendment is not as broad as would result from interpreting the multiple bid requirement to apply only to the component part exceeding \$50,000, the amendment still made a meaningful change to the bill as introduced and to the law currently in effect.

The general rule is that "where it is manifest upon the face of a statute that an error has been made in the use of words, number, grammar, punctuation or spelling, the court, in construing and applying the statute, will correct the error in order that the intention of the Legislature as gathered from the entire act may be given effect." City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940). In this case, it is not manifest from the face of the statute that a drafting error has occurred and, accordingly, it goes beyond a court's authority to rewrite the statute based on legislative history when the statute is clear and unambiguous. See Peterson v. Heitkamp, 442 N.W.2d 219, 221 (N.D. 1989) ("When a statute is unambiguous, it is improper for the court to attempt to construe the provisions so as to legislate that which the words of the statute do not themselves provide.").

Therefore, it is my opinion that the plain language of N.D.C.C. § 48-01.1-06 requires multiple prime bids for the general, electrical, and mechanical portions of a construction project whenever the cost of any individual, multiple prime portion is in excess of \$50,000.

Honorable George Keiser  
June 18, 1997  
Page 5

Requiring all three multiple prime bids whenever the cost of a single portion exceeds \$50,000 is consistent with the additional provisions of N.D.C.C. § 48-01.1-06 where the three multiple prime bids are compared against the competitive cost of the single prime bid. Requiring all three multiple bids is also consistent with the coordination of work and assignability provisions under N.D.C.C. § 48-01.1-08. That section provides that "[a]fter competitive bids for the general, electrical, and mechanical work are received as part of the multiple prime bids, the governing board may assign the electrical and mechanical contract and any other contracts to the general contractor for the project to facilitate the coordination and management of the work only."

Your second concern deals with general contractors "imbedding" or shifting cost elements within the multiple prime bid categories. Your hypothetical assumes that not all the electrical work necessary for the project would be bid under the electrical multiple prime portion thereby bringing the cost of that portion under \$50,000. Under the contrary interpretation of N.D.C.C. § 48-01.1-06 where each multiple prime portion of the contract would only be required to be bid if the cost of the individual portion exceeded \$50,000, such cost shifting would serve to circumvent the bidding requirements of that section. However, as stated above, it is my opinion that if the cost of any individual multiple prime portion exceeds \$50,000, then all three multiple prime bids are required. Accordingly, under this interpretation, there is little incentive to shift cost items from one multiple prime category to another.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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