

N.D.A.G. Letter to Kropp (June 26, 1990)

June 26, 1990

Mr. Lawrence P. Kropp
Attorney at Law
105 Tenth Street SE
Jamestown, ND 58401

Dear Mr. Kropp:

On June 12, 1990, you wrote regarding the action of the governing board of the South Central Child Support Enforcement Unit recently taken with respect to the lease of office space for that unit. I understand that you have posed this question as an assistant state's attorney for the various counties involved in the South Central Child Support Enforcement Unit, and thus as attorney for that governing board.

The action in question concerns the May 24, 1990, "Resolution of Acceptance," concerning a bid for office space. According to your letter and the attached minutes of the governing board meeting of May 24, 1990, the board has determined to enter into a three-year lease of office property located at 519 NW Fifth Street in Jamestown, North Dakota.

This property is owned by Mr. Pat Folk. Mr. Folk is an elected member of the Stutsman County Commission. He was appointed by that commission to serve as a member of the Stutsman County Social Service Board. The Stutsman County Social Service Board appointed Mr. Folk to serve as Stutsman County's representative on the governing board of the South Central Child Support Enforcement Unit. The South Central Child Support Enforcement Unit is an entity created by several counties, including Stutsman County, for the purpose of carrying out certain of the duties of the county social service board set forth in N.D.C.C. § 50-01-09, N.D.C.C. ch. 50-09, and N.D.C.C. §§ 50-24.1-03.1 and 50-24.1-03.2.

According to N.D.C.C. § 12.1-13-03(1), it is a class A misdemeanor for a public servant authorized to sell or lease any property, alone or in conjunction with other public servants, to voluntarily become interested individually in the sale or lease. However, subsection 2 provides that subsection 1 does not apply to contracts of purchase between a political subdivision and an officer of that subdivision if the contracts are first unanimously approved by the other members at a meeting of the governing body of the political subdivision and unanimous findings entered in the official minutes of that body that the contract is necessary because the services or property contracted for are not otherwise available at equal cost.

The exception provided for in subsection 2 of the statute refers to contracts of "purchase" between a political subdivision and an officer of that subdivision. A lease is a contract.

N.D.C.C. § 47-16-01. However, it is not clear whether a contract for the temporary possession of real property is a contract of "purchase" as that term is used in N.D.C.C. § 12.1-13-03(2)(a). Valid arguments can be made reaching either conclusion.

Statutory terms which are not defined must be given a common and ordinary sense definition. N.D.C.C. § 1-02-02. The common definition of the term "purchase" as it concerns property refers to obtaining property by means other than descent or inheritance by paying money or its equivalent. Webster's New Collegiate Dictionary 936 (1975). A lease is a contract which gives one party the right to the temporary possession and use of real property. N.D.C.C. § 47-16-01. Applying these definitions, an agreement to lease real property is a contract to purchase the temporary possession of real property. Thus, a contract of purchase includes an agreement to lease real property.

This conclusion is further supported by the expansive definition given to the term "property" used within the statute. N.D.C.C. § 12.1-13-03(2)(a) requires a unanimous finding must be entered in the public body's official minutes indicating that the contract with the member of the political subdivision is necessary because the services or "property contracted for" are not otherwise available at an equal cost. The term "property" includes both real and personal property. N.D.C.C. § 1-01-49(7). Therefore, the exception provided in N.D.C.C. § 12.1-13-03(2)(a) refers, in part, to contracts of purchase of real and personal property. As "statutes must be construed to avoid ludicrous and absurd results," State v. Jelliff, 251 N.W.2d 1, 7 (N.D. 1977), I cannot conclude that the legislature intended to except contracts for the unequivocal purchase of real property but not the conditional purchase of real property (i.e., temporary possession). Therefore, the term "contracts of purchase" used in N.D.C.C. § 12.1-13-03(2)(a) does include a lease of real or personal property.

The "Resolution of Acceptance" plainly reflects the governing board's determination to bring the decision to lease the Folk property within the exception created by N.D.C.C. § 12.1-13-03(2). The bid submitted by Pat Folk was "first unanimously approved by the other members at a meeting of the governing body." Additionally, the resolution includes a "finding" that Pat Folk's bid is the lowest bid, and that "Mr. Folk's building is the best over-all site, an equivalent site is not otherwise obtainable at less or equal cost." It is, therefore, my opinion that if the minutes provided with your letter accurately reflect the actions taken by the governing board, the exception provided by N.D.C.C. § 12.1-13-03(2)(a) is available in this matter.

You also ask if N.D.C.C. § 11-09-47 may be applicable to this transaction. That section precludes any member of the board of county commissioners of a county which has adopted any form of county managership from being interested, directly or indirectly, in any contract in which the county is a party. This section, on its face, has no application to this transaction because Stutsman County has not adopted any form of county managership.

You also ask if N.D.C.C. § 48-02-12, which provides that no member of a governing board shall be pecuniarily interested or concerned directly or indirectly in any public contract that

may be entered into by such board or officer, has application to this transaction. N.D.C.C. ch. 48-02 concerns actions by governing boards of political subdivisions taken in altering, repairing, or constructing any building belonging to or appertaining to any of the public institutions of the state or political subdivisions. It is my opinion that section 48-02-12 has application to the construction contracts governed by chapter 48-02, but does not have general application to all contracts which may be entered into by the state or its political subdivisions. It has no application to a contract for the lease of real property entered into by the South Central Child Support Enforcement Unit.

Sincerely,

Nicholas J. Spaeth

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