

LETTER OPINION
97-L-199

December 23, 1997

Honorable Robert R. Peterson
State Auditor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your letter asking about qualifications as an "independent audit firm" and the conduct of a "performance audit" for purposes of legislation relating to the Workers Compensation Bureau and Job Service North Dakota.

The language at issue is contained in North Dakota Century Code (N.D.C.C.) §§ 52-02-18 and 65-02-29. Those two sections, both enacted in 1997, provide as follows:

The state auditor shall appoint on a biennial basis an independent audit firm, with extensive expertise in job service practices and standards, to complete a performance audit of the divisions of job service North Dakota. The audit must evaluate divisions of job service North Dakota, as determined necessary by the state auditor, to determine whether the divisions are providing quality service in an efficient and cost-effective manner. The audit report must contain recommendations for divisional improvement or an explanation of why no recommendations are being made. The executive director of job service North Dakota and the auditor shall present the audit report and any action taken as a result of the audit to the legislative council's legislative audit and fiscal review committee and to the house and senate industry, business and labor standing committees during the next regular session of the legislative assembly following the audit. The executive director shall also provide a copy of the audit report to the state auditor.

N.D.C.C. § 52-02-18.

The state auditor shall appoint on a biennial basis an independent audit firm, with extensive expertise in workers' compensation practices and standards, to complete a performance audit of the departments of the bureau. The audit must evaluate departments of the bureau, as

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determined necessary by the state auditor, to determine whether the departments are providing quality service in an efficient and cost-effective manner. The audit report must contain recommendations for departmental improvement or an explanation of why no recommendations are being made. The director of the bureau and the auditor shall present the audit report and any action taken as a result to the legislative council's legislative audit and fiscal review committee and to the house and senate industry, business and labor standing committees during the next regular session of the legislative assembly following the audit. The director also shall provide a copy of the audit report to the state auditor.

N.D.C.C. § 65-02-29.

In addition to the above two sections, N.D.C.C. §§ 65-02-06.1 and 65-02-30 also relate to workers compensation performance audits and the information to be determined therefrom.

Your questions relate to whether the "independent audit firm" appointed to conduct these audits must be a professional accounting firm acquainted with performing audits and rendering audit reports, or whether another professional "consulting" firm may be hired to perform the audits required. Also, you question what standards must be followed by the audit firm hired and whether the firm must meet the generally accepted auditing standards applicable to performance audits as noted in N.D.C.C. § 54-10-01(3).

When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05. Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language. Technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or as are defined by statute, must be construed according to such peculiar and appropriate meaning or definition. N.D.C.C. § 1-02-03.

The phrase "audit firm" is used only in N.D.C.C. §§ 52-02-18, 65-02-29, and 65-02-30. The term "performance audit," in addition to the sections cited in the previous paragraph, is used in N.D.C.C. §§ 54-10-01(3), 65-02-06.1, and 65-06.2-09. However, neither N.D.C.C. § 52-02-18 nor N.D.C.C. § 65-02-29 defines either "audit firm" or "performance audit."

The North Dakota Supreme Court has held where a section of law under consideration does not intend to adopt a section-specific definition of a term, other sections in the Code defining that term may be looked to for a definition. Northern X-Ray Co., Inc. v. State Tax Commissioner, 542 N.W.2d 733, 738 (N.D. 1996). In the Northern X-Ray case, the state sought to impose a contractor use tax on an out-of-state corporation under N.D.C.C. § 57-40.2-03.3. Because the tax chapter involved did not contain a definition of the term "contractor," the court stated:

There is a detailed definition of the term "contractor" in section 43-07-01(3), N.D.C.C. There is no indication in the legislative history of section 57-40.2-03.3, NDCC, that the legislature intended to adopt a section-specific definition of "contractor" contrary to the definitions used elsewhere in the code. Therefore, we look to the section 43-07-01(3) definition when construing section 57-40.2-03.3. See N.D.C.C. section 1-01-09. . . .

Northern X-Ray, at 738.

The court in Northern X-Ray cited N.D.C.C. § 1-01-09 which states:

Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs in the same or subsequent statutes, except when a contrary intention plainly appears.

Therefore, given the absence of a definition of the terms "independent audit firm" and "performance audit" in N.D.C.C. §§ 52-02-18 and 65-02-29, it is my opinion that reference may be made to the common and ordinary meaning of the terms and other statutes which define or describe those terms. The only North Dakota statute that defines or describes the term "performance audit" is N.D.C.C. § 54-10-01(3). That subsection states:

Perform or provide for performance audits of state agencies as determined necessary by the state auditor or the legislative audit and fiscal review committee. A performance audit must be done in accordance with generally accepted auditing standards applicable to performance audits.

It is therefore my opinion that a "performance audit" performed pursuant to N.D.C.C. §§ 52-02-18 and 65-02-29 must be performed in

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accordance with generally accepted auditing standards applicable to performance audits. I have been informed that those standards appear in a publication of the United States General Accounting Office entitled Government Auditing Standards (1994 revision).

It is also my opinion that an "independent audit firm" is a professional firm trained in and acquainted with audits, including performance audits, that is able to refer to and apply the generally accepted auditing standards applicable to performance audits as required by N.D.C.C. § 54-10-01(3) and to produce an audit report as required by N.D.C.C. §§ 52-02-18 and 65-02-29 based on its analysis and employing the standards applicable to performance audits. In practice, this kind of "independent audit firm" is a professional accounting firm with appropriately licensed and skilled accountants and auditors able to audit, employ generally accepted auditing standards applicable to performance audits, and prepare an audit report based on its review and application of the required audit standards. Referring again to N.D.C.C. § 54-10-01, subsection 4 of that section indicates that audits and reviews (without distinguishing between financial and performance audits) may be performed by the State Auditor or by contract with a private certified or licensed accountant or other qualified professional. Performing an "audit" falls under the definition of the practice of accountancy in N.D.C.C. § 43-02.2-02(6), and it would therefore very likely be a criminal violation for someone other than a professional accounting firm to conduct a performance audit. See N.D.C.C. §§ 43-02.2-12, 43-02.2-14.

Thus, it is my opinion that an "audit firm" is a professional accounting firm. However, if the professional standards of independent audit firms include subcontracting with and employing professional advice from other types of professional "consulting" firms on a specific subject, such as workers compensation or job service, then an independent auditing firm appointed under the two sections of law in question herein could appropriately seek advice and expert information and analysis from such other professional firm, employ that expertise in its own analysis using generally accepted auditing standards applicable to performance audits, and include it in its audit report.

Sincerely,

Heidi Heitkamp

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ATTORNEY GENERAL

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