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Thomas H. Frieberg
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115 N 3rd St.
P.O. Box 511
Beresford, SD 57004-0511

Official Opinion No. 18-02

Re: **Competitive bidding requirements for water tower painting and maintenance contract**

Dear Mr. Frieberg,

In your capacity as City Attorney for the City of Beresford, you have requested an official opinion from the Attorney General's Office based on the following questions:

QUESTIONS:

1. Is the City required to publicly bid a water tower painting and maintenance contract pursuant to SDCL ch. 5-18A?
2. Is a water tower painting and maintenance contract exempt from public bidding as a professional service under SDCL 5-18A-14?
3. Is a water tower painting and maintenance contract exempt from public bidding as an equipment repair contract under SDCL 5-18A-22(4)?

ANSWERS:

1. Painting and maintenance of a water tower should be considered public improvements under SDCL 5-18A-1(22). Contracts for public

improvements over \$50,000 must be submitted for public bid regardless of payment schedule.

2. The professional services exemption of SDCL 5-18A-14 does not apply to the proposed water tower and tank paint and maintenance contract.
3. Real property improvements are not equipment for the purposes of qualifying for the exemption found under 5-18A-22(4).

FACTS:

The City of Beresford owns and operates a water distribution system which includes a water tower and tank. Both the tower and tank require painting estimated to cost more than \$150,000. The City wishes to enter into a contract for work on the water tower which includes painting and annual maintenance. The overall cost of this contract will be spread over a ten-year period. Painting would occur in year one of the contract, with annual inspections and maintenance occurring in all following years.

A company in the water tower/tank industry has given a preliminary proposal to the City. This company believes the painting of the tank and tower is exempt, under SDCL 5-18A-14, from the state public bidding requirements as a professional service. Alternatively, the company has suggested multi-year agreements for maintenance of the tower and tank are exempt from public bidding requirements, under SDCL 5-18A-22(4), as equipment repair contracts.

IN RE QUESTION 1:

You have asked whether the City of Beresford is required to bid the proposed painting and maintenance contract described above under the provisions of SDCL ch. 5-18A.

SDCL 5-18A-14 states, “[i]f the purchasing agency intends to enter into a contract for any public improvement that involves the expenditure of fifty thousand dollars or more . . . the purchasing agency shall advertise for bids or proposals.” (emphasis added). A “[p]ublic improvement” has been defined as:

the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any structure, building, or other improvements of any kind to real property, the cost of which is payable from taxes or other funds under the control of the purchasing agency, and includes any local improvement for which a special assessment is to be levied.

SDCL 5-18A-1(22).

The purpose of statutory construction is to discover a statute's true intent primarily through an analysis of its language. *In re Estate of Ricard*, 2014 S.D. 54, ¶ 8, 851 N.W.2d 753, 755-56. When interpreting statutes, the state Supreme Court has explained:

'[W]e begin with the plain language and structure of the statute.' ...
'When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed.' ...
'When we must, however, resort to statutory construction, the intent of the legislature is derived from the plain, ordinary and popular meaning of the statutory language.'

In re Wintersteen Revocable Trust Agreement, 2018 S.D. 12, ¶ 12, 907 N.W.2d 785, 789 (citations omitted). The intent of a statute "must be determined from the statute as a whole, as well as enactments relating to the same subject." *In re Taliaferro*, 2014 S.D. 82, ¶ 6, 856 N.W.2d 805, 806-07.

The definition of "public improvement" in SDCL 5-18A-1(22) is very broad. The process of painting and maintaining a city-owned water tower and tank involves the alteration, repair, or improvement of a part of the public infrastructure of the city. SDCL 5-18A-1(22). It is my opinion that the contract offered to paint and subsequently maintain the water tower and tank is a public improvement contract that must be bid under the requirements of SDCL ch. 5-18A.

This conclusion is consistent with the directive of SDCL 9-42-5 which requires, in pertinent part, that "contract[s] for the construction or repair of public buildings or for public works or improvements... shall be let to the lowest responsible bidder in accord with the provisions of [SDCL chs.] 5-18A and 5-18B." "Public Works" are defined as "[s]tructures (such as roads or dams) built by the government for public use and paid for by public funds." *Public Works*, Black's Law Dictionary (10th Ed. 2014). The water tower and tank are part of the public infrastructure or public works of the City, and a contract for their repair and maintenance must be bid under the requirements of the state competitive bidding statutes.

The above conclusion is not altered when considering the painting and maintenance contract proposes to spread the cost of the contract over a period of years. The Supreme Court has held that it is the total cost of a particular supply or task that invokes the state competitive bidding requirements, not simply the amount paid at any one time. *Fonder v. City of South Sioux Falls*, 71 N.W.2d 618 (S.D. 1955). The Court there stated, "it is inconceivable that the lawmakers intended to provide a lawful means by which its prime objective to require that the major needs of the public for materials, supplies or equipment

be met through competitive lettings could be circumvented by multiple small open-market purchases.” *Id.* at 621.

The proposed contract for painting and maintenance of a city-owned water tower and tank is a public improvements contract. Painting and maintenance alter, repair, and improve the value of pieces of the public infrastructure of the City of Beresford. Regardless of the payment schedule, the contract exceeds \$50,000, and the City is required to let the contract in accord with statutory competitive bidding procedures.

IN RE QUESTION 2:

You have also asked whether the proposed painting and maintenance contract is exempt from the public bidding statutes as a professional service.

SDCL 5-18A-14 states, in relevant part, “[i]f the purchasing agency intends to enter into . . . a contract for the purchase of supplies or services, *other than professional services*, that involves the expenditure of twenty-five thousand dollars or more, the purchasing agency shall advertise for bids or proposals.” (emphasis added). SDCL 5-18A-1(19) defines professional services as “services arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.”

The rules of statutory construction require me to give effect to the “clear, certain, and unambiguous” intent of a statute through an analysis of the “plain, ordinary and popular” meaning of a statute’s language. *Wintersteen Revocable Trust*, 2018 S.D. 12, ¶ 12.

It should be noted that bidding requirements “ought not to be frittered away by exceptions but”, should be construed in a manner that will “reasonably effectuate . . . their true intent and purpose....” *Rapid City Area School Dist. No. 51-4 v. Black Hills and Western Tours, Inc.*, 303 N.W.2d 811, 813 (S.D. 1981) (quoting *Bak v. Jones County*, 210 N.W.2d 65, 69 (S.D. 1973)). The purpose of competitive bidding requirements is to guard against “undue and excessive costs which might otherwise be imposed on the taxpayers.” *Clem v. City of Yankton*, 160 N.W.2d 125, 134 (S.D. 1968). A contract should be let without public bidding only in those instances that clearly and definitively fall within an exemption’s terms.

The painting of, and subsequent maintenance work on, a water tower or tank is generally understood to involve skill that is manual or physical in nature rather than predominantly mental or intellectual in nature. Because of this, it is my opinion that the proposed contract to paint and then maintain the City’s water tower and tank does not fall under the terms of the professional services exemption found in SDCL 5-18A-14.

IN RE QUESTION 3:

Finally, you have asked whether the proposed contract qualifies as an equipment repair contract exempt from the public bidding requirements by operation of SDCL 5-18A-22(4). This statute states in pertinent part that, “[t]he provisions of this chapter and chapters 5-18B, 5-18C, and 5-18D do not apply to: . . . (4) [a]ny equipment repair contract.”

The rules of statutory construction discussed above apply to an analysis of SDCL 5-18A-22(4). See *Wintersteen Revocable Trust*, 2018 S.D. 12, ¶ 12; *Taliaferro*, 2014 S.D. 82, ¶ 6; and *Estate of Ricard*, 2014 S.D. 54, ¶ 8.

“Equipment repair contracts” are not defined by statute, nor has SDCL 5-18A-22(4) been discussed by the state Supreme Court. “Equipment” is most commonly understood to be the articles or implements used by a person in a specific operation or activity. See *Equipment*, Black’s Law Dictionary (10th Ed. 2014); *Equipment*, Merriam-Webster’s Collegiate Dictionary (10th Ed. 1993). Permanent structures on real property that make up part of the public works or infrastructure of a municipality are not commonly considered equipment. See SDCL 43-1-3 (defining real property as including “that which is affixed to land”). For purposes of the exemption found in SDCL 5-18A-22(4), it is my opinion that the water tower and tank at issue do not meet the common and ordinary meaning of the term “equipment.” As such, the proposed contract for painting and maintenance of the water tower and tank is not an equipment repair contract exempt from the state public bidding requirements.

CONCLUSION

It is my opinion that the proposed contract for painting and maintenance of the City of Beresford’s water tower and tank is not exempt from the state public bidding requirements as a professional services contract or an equipment repair contract. Under existing law, the proposed contract is a public improvement contract in excess of \$50,000. According to SDCL 5-18A-14 this contract must be publicly bid.

Sincerely,



Marty J. Jackley
ATTORNEY GENERAL

MJJ/SRB/JH/lde