

QUESTION:

May a firm offering professional services, of which a legislator is a member, contract with the state to provide professional services when the legislator-member voted for the appropriations act which funded the project?

SUMMARY:

The Standards of Conduct Law, §112.314(1), F. S., does not prohibit a professional firm of which a legislator is a member from entering into a contract with the state for professional services. The legislator should file with the Department of State a sworn statement disclosing his interest in the firm, as required by §112.313(2), *id.*

Section 112.314(1), F. S., which prohibits a public body from entering into a business transaction with a business entity in which one of its members has an interest, does not apply to legislators. The only statutory provisions which even arguably apply in these circumstances are §§112.311, 112.313(2), and 112.316, F. S. The first is the declaration of policy and in relevant part recites that a public officer or employee, including a legislator, may not engage in any private business which is in "substantial conflict with the proper discharge of his duties in the public interest." It also notes that one of the purposes of this code of ethics is to "strengthen the faith and confidence of the people of the state in their government." Section 112.316, is entitled "Construction" and provides, in effect, that a public officer or employee may accept any other employment which does not interfere with the full and faithful discharge of his duties to the state.

Under these statutory provisions, my predecessor in office and I have consistently ruled that there is no statute which prohibits a legislator from contracting to perform public works. In AGO's SC67-3 and SC68-9, it was held that a construction firm of which a legislator is president may bid on construction contracts with the state. *Accord:* Attorney General Opinion 071-264, ruling that a construction firm of which a legislator is president may engage in a business transaction with a housing authority; and AGO 071-137, in which it was held that a legislator may be employed as a consultant to an island authority or as a supervisor in the county public school system without violating the Standards of Conduct Law. There have been no changes in the statutory law since these opinions were rendered which would require a different conclusion.

Under §112.313(2), *supra*, a public officer or employee is required to file a sworn statement disclosing an interest as officer, director, agent, member of, or owner of a controlling interest (10 percent or more) in, a business entity which is subject to the regulation of, or which has substantial business commitments from, any state or local governmental agency. In AGO 072-172 I ruled that a law or other professional firm, partnership, or association (or corporation, in a proper case) is a "business entity" within the purview of §112.313(2); and a legislator who is an officer, director, agent, or member of, or who owns a controlling interest in, any such business entity must file a sworn statement with the Department of State disclosing such interest.

073-259—July 17, 1973

SCHOOLS**COMPETITIVE BIDDING MAY NOT CONTAIN ESCALATOR CLAUSE**

To: Floyd T. Christian, Commissioner of Education, Tallahassee

Prepared by: Victor Walsh, Assistant Attorney General

QUESTION:

May a district school board accept bids for the supply of its petroleum product needs when such bids contain "escalator" or "posted market price" clauses?

SUMMARY:

Under Rule 6A-1.12(5) of the State Board of Education, a district school board must request bids from three or more sources for any authorized purchase exceeding the amount stated in the rule according to the district's size, and must accept the lowest and best bid. Thus, under §237.02, F. S. (1972 Supp.), and Rule 6A-1.12(5), a district school board may not solicit or accept bids or enter into contracts for purchase of petroleum products when such bids and contracts contain open price terms in the form of escalator or posted market price clauses.

"Escalator" or "posted market price" clauses are incapable of exact definition. There is no formula for their construction and their meaning varies according to the mutual intentment of the parties. Generally, such clauses recite that the future price by which the parties will be bound will fluctuate according to some agreed-upon market or other standard fixed by a third party. Such clauses may also involve formulae utilizing variable factors, such factors again to be determined by third parties.

Posted market price is treated in *American Refining Co. v. Sims Oil Co.*, 282 S.W. 894 (Ct. Civ. App., Texas, 1962). Anno. 55 A.L.R. 268 considers "Current Market Price." *E. F. Prichard Co. v. Heidelberg Brewing Co.*, 212 S.W.2d 293 (Ky. 1948), discusses escalation clauses and "prevailing prices." "Posted price" is deemed a valid open term price by the official comment to the Uniform Commercial Code, §2-305. Those old cases condemning contracts having open price terms as ambiguous are of little viability in light of the U.C.C. Normally, therefore, contracts containing escalator clauses are valid. However, for the reasons hereinafter stated, I have the view that a district school board may not presently enter into contracts of this type.

Former §237.02(2)(a), F. S. 1971, required school boards to entertain competitive bids from three or more sources when the needed material exceeded a cost of one thousand dollars. As one alternative, the former statutory scheme authorized the State Board of Education to provide for variant procedures by regulation when the character of the item needed made competitive bidding impractical. Section 237.02(2)(b), *id.* Former §237.02(1)(c) and (2)(b), *id.*, provided another alternative in that in districts in which the county purchasing agent had been authorized by law to make purchases for other governmental agencies within the county, the school board had the option of purchasing from the current county contracts at the unit price stated therein, if to do so would be of economic advantage to the school board.

The above statutory provisions were amended in 1972. (Chapter 72-221, Laws of Florida.) New §237.02, F. S., no longer requires that, as a primary procedure, the school board solicit competitive bids from three or more suppliers. As noted in AGO 071-395, as a matter of statutory construction:

When an amendatory act purports to set out the original section as amended, all matters in the section that are omitted in the amendment are considered to be repealed.

Accordingly, there is no present statutory requirement that school boards utilize competitive bidding. The two alternatives to competitive bidding under the old statutes, *supra*, were carried forward substantially unchanged as §237.02(1)(b) and (2), F. S. (1972 Supp.). The new primary procedure is set out in §237.02(1)(a), F. S. (1972 Supp.), as follows: "Each district school board shall develop and adopt

policies establishing the plan to be followed in making purchases *as may be prescribed by the state board.*"

Section 237.02, *id.*, was again amended in 1973 (Ch. 73-137, Laws of Florida). However, this amendment is not material to the present question. The school board, after it has established its plan, is given such latitude as is consistent with law and the rules of the State Board of Education. It should be noted that "The school board shall endeavor to obtain maximum value for all expenditures." Section 237.02, *supra*. Also, §230.23(10)(j), F. S., requires that each school board secure and give consideration to the purchasing regulations of the Division of Purchasing of the Department of General Services, and to the prices available to the school boards under such regulations.

The rules and regulations of the State Board of Education appear in the Florida Administrative Code. Section 6A-1.12(5), regulating school board purchases, echoes former §237.02(2)(a), *supra*. It requires district school boards to request bids from three or more sources for any authorized purchase exceeding the amounts set forth in the following district size and amount scale: In districts with 1-499 prior year instruction units, two thousand dollars; in districts with 500-999 prior year instruction units, three thousand dollars; and in districts with 1000 or more prior year instruction units, four thousand dollars. The school board has the authority to reject any or all bids and request new bids. In acceptance of bids, the school board shall accept the lowest and best bid.

Rule 6A-1.12(6) waives the competitive bidding requirement of Rule 6A-1.12(5), *id.*, but only as to certain items. Petroleum products are not included within the class of waived items. Accordingly, when such products are being acquired, the purchase is subject to all the conditions and requirements of Rule 6A-1.12(5).

Rule 6A-1.12(3) tracks the statutory option contained in §237.02(1)(b), *supra*, and provides that, if the county purchasing agent is authorized by law to make purchases for other governmental agencies within the county, the school board has the option to purchase under the current county contracts at the unit price stated therein when such purchase is to the economic advantage of the school board. Rule 6A-1.13 reflects §229.79, F. S. Under this rule, purchases may be pooled and the Department of Education may act as agent for the participating school districts. When the Department of Education is designated as the agent for the pool, purchases shall be made in accordance with the requirements of the Division of Purchasing of the Department of General Services.

From the foregoing, it may be seen that although there is no longer a statutory requirement for competitive bidding, the regulations of the State Board of Education still operate to require such a procedure.

In AGO 053-30, Feb. 10, 1953, Biennial Report of the Attorney General, 1953-1954, p. 150, one of my predecessors held that a county could not entertain competitive bids for petroleum needs when such bids contained posted market price or escalator clauses. That opinion turned upon former §125.08, F. S., which required counties to entertain competitive bids for all purchases over a stated amount. Section 125.08, *supra*, has been repealed. As noted in AGO 071-366, absent such a statute, a county may or may not adopt competitive bidding as it sees fit. There is no common law rule or public policy which mandates that a public body utilize competitive bidding procedures.

The rationale of AGO 053-30 is applicable here. In that opinion, it was reasoned that all competitive bids must of necessity be firm bids. Open price terms in the form of posted market price or escalator clauses were not firm, and, therefore, bids containing such provisions did not satisfy the statute. *Accord*: 063-53 and 055-200; AGO 051-341, Oct. 2, 1951, Biennial Report of the Attorney General, 1951-1952, p. 409; AGO 049-195, May 5, 1949, Biennial Report of the Attorney General, 1949-1950, p. 315; and AGO 047-326, Sept. 25, 1947, Biennial Report of the Attorney General, 1947-1948, p. 289, construing the former competitive bidding statutes governing purchases by school boards. Thus, the district school

boards may only do those things and exercise those options provided for in the Rules (6A-1.12 and 6A-1.13) duly promulgated by the State Board of Education under and in implementation of §237.02, F. S., (1972 Supp.). *See City of Cape Coral, Florida v. GAC Utilities, Inc., of Florida*, 281 So.2d 493 (Fla. 1973). Unless and until the State Board of Education should modify or repeal its rules, the school districts may not solicit or accept bids for petroleum products when such bids contain escalator or posted market price terms, nor may they contract to purchase such products on this basis.

073-260—July 17, 1973

ELECTIONS

POWER OF LEGISLATURE TO DESIGNATE ELECTORS—ROAD AND BRIDGE DISTRICT

To: James A. Sebesta, Hillsborough County Supervisor of Elections, Tampa
Prepared by: Sydney H. McKenzie III, Assistant Attorney General

QUESTION:

Are the provisions of §§336.62(2) (e) and 336.61, F. S. [Ch. 72-385, Laws of Florida], relating to the establishment of a special road and bridge district which provide, *inter alia*, that "any entity owning legal title to real property within the district, whether residing in the district or not" shall be a qualified elector, and further provide for proxy voting, lawful and constitutional?

SUMMARY:

The provisions of §§336.62(2) (e) and 336.61(1), F. S., providing, *inter alia*, that any entity owning legal title to real property within the district, whether residing therein or not, shall be among those qualified as electors and also providing for proxy voting are in accordance with the powers granted to the legislature by the Florida Constitution for establishing voting qualifications in governmental entities and are not contrary to the provisions of the Federal Constitution.

Your question should in my opinion be answered in the affirmative.

Section 336.62(2)(e), *supra*, provides in relevant part:

(e) At all elections held pursuant to this section qualified electors shall be persons who reside within the district that are qualified to vote in any general or special election or who are owners of land within the district, whether said owners reside within the district or not. . . . In defining these voter qualifications it is intended that all persons either directly or indirectly affected by any tax and improvements derived therefrom be granted a voice. Such vote shall be in person or by proxy. No proxy shall be effective unless acknowledged by a notary public. . . .

Section 336.61(1), *supra*, provides in relevant part:

Whenever the term "person," "voter," or "elector" is referred to in §§336.62-336.67 it shall be deemed to mean *any entity* owning legal title to real property within the district, whether residing within the district or not, and any person residing within the district who is eligible to vote in any general or special election. (Emphasis supplied.)

The authority for special districts such as the subject road and bridge district to