

NEW YORK STATE BAR ASSOCIATION  
Professional Ethics Committee Opinion

Opinion #9 - 12/8/65 (10-64) Topic: Bidding for Employment.

Digest: Improper for lawyer to bid competitively for employment with municipal corporation.

Canon: None

QUESTION

Dear Mr. "X":

Your letter addressed to Mr. Hugh R. Jones, formerly Chairman of this Committee, dated November 20, 1964, has been referred to me.

The question you have asked is whether an attorney may submit a bid for professional services to a school board without acting in violation of the Canons of Professional Ethics.

The question that you have asked is primarily one of law and concerns the provisions of Section 103 of the General Municipal Law. However, that Section has been held to have no application to the employment of professional services such as those of architects, physicians, surveyors, lawyers, etc.

OPINION

While it is not the function of this Committee to advise on questions of law, nevertheless I refer you to the following authorities:

"A Board of Supervisors may employ a certified public accountant to conduct an audit without advertising for bids." 9 Op. State Compt. File No. 6420, 1953.

See also People v. Flagg, 17 N.Y. 584; Harlem Gas Co. v. Mayor, etc. of N.Y., 33 N.Y. 309.

In the Harlem Gas case, it was contended that a contract for furnishing gas to the City of New York could not be enforced because the contract was let without competitive bidding as required by the statute then in effect. The court said that it was claimed that it was a case of contract for supplies to be furnished for a particular purpose and involved an expenditure of over \$250, and therefore fell within the inhibition of the amended charter which prohibited such contracts unless executed in duplicate in favor of the lowest bidders on advertisements for sealed proposals.

Rejecting this argument, the court said, Porter, J.:

"The contract in question is not within the legitimate scope and intent of these provisions in the amended charter. They were designed to regulate contracts for the performance of work and the purchase of supplies. \* \* \* The contract, though spoken of in a loose and general sense as one for the sale

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of gas by the company, was in substance and effect an agreement, that the city authorities should have the privilege of using the property of the plaintiff, for the purpose of lighting the streets and avenues in a particular district \* \* \*. To extend the provisions of this section of the amended charter to such a case in disregard of a manifest purpose of the enactment, would involve a departure from the familiar rule that general words are to be restrained in their application to the subject matter in reference to which they are employed. People v. Flagg, 17 N.Y. 587, etc."

And at page 330, the court said, Brown, J.:

"The city needs lands in the particular locality for a public market, an engine house or other public building. It requires professional services, those of an engineer, a physician, a lawyer or an artist, or it may require services of any kind, and property to be furnished upon a sudden and unforeseen emergency of greater value than the \$250. If these things can only be obtained through the forms prescribed by the statutes, they cannot be obtained at all, for these things cannot become the subject of a competitive offer to be consummated by written contract with the person making the most favorable offer. To this effect are the remarks of Judge Comstock upon the sections of the statutes referred to in the case of People v. Flagg, 17 N.Y. 584, and seem to me to be marked by reason and sound sense and commend themselves as expressing the true construction of the legislative intention."

The subject is also discussed in 10 McQuillin on Municipal Corporations, Section 29.35, where cases are cited from several jurisdictions to the effect that professional services such as those to be rendered by a lawyer are not within the meaning and intent of the statutes.

The foregoing is fortified by a letter which I procured from the Director of the State Education Department under date of November 23rd, a copy of which is herewith enclosed.

As to the question of professional ethics, reference is made to Opinion A-83 of the Committee on Professional Ethics of the American Bar Association, reading as follows:

"He [an attorney] may not properly submit a competitive bid for his services to the Government or other bodies and persons requiring legal services."

See also Drinker on Professional Ethics, pages 174, 191, 220, 249-250.

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The Committee concurs with the quoted opinion of the Committee of the American Bar Association, and would regard it as highly improper for a lawyer to offer his services to a municipal corporation or other governmental body by competitive bidding. To do so would not only be undignified but would be inconsistent with the lawyer's professional duties and with the proper relation of attorney and client, in that the municipal corporation would be obliged to accept whatever attorney should offer his services at the lowest price regardless of his professional qualifications and personal characteristics.

UNIVERSITY OF THE STATE OF NEW YORK  
State Education Department  
Division of Law  
Albany, New York

November 23, 1964

Frederick C. Stimmel, Esq.  
New York State Bar Association  
99 Washington Avenue  
Albany, New York

Dear Mr. Stimmel:

In answer to your letter of November 23rd, it has been the opinion of this office over the years that Section 103 of the General Municipal Law applies only to purchase contracts and to public works contracts but does not cover services, particularly professional services, such as those of architects, physicians, surveyors, lawyers, etc.

In our view the legislative history as well as the very nature and purpose of this provision clearly excludes services of any kind and particularly professional services.

It has always been our opinion that the relationship between a school district and an attorney must be based on complete freedom of contract on both sides, both as to the nature and amount of services to be rendered by the attorney and the charges to be made therefor.

Sincerely yours,

JOHN P. JEHU

Director

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