



STATE OF WEST VIRGINIA
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March 22, 1988

Bud Thaxton, Esquire
Thaxton and Daniels
1115 Virginia Street, East
Charleston, West Virginia 25301

Dear Mr. Thaxton:

On February 25, 1988, you requested the opinion of the Attorney General on the issue of whether or not a bond required by the conditions of a bid for a construction project must be countersigned by a licensed, resident agent as a condition precedent to acceptance of the bid. Ordinarily, the Attorney General only gives his written opinion upon questions of law to those persons enumerated by Chapter 5, Article 3, Section 1, of the West Virginia Code of 1931, as amended (hereinafter Code). However, in circumstances where the issue presented has an importance for the functioning of all divisions of the government of the State, the Attorney General has an enunciated policy of responding to requests regardless of the source. The situation posed by your request impacts upon all bids for construction projects exceeding Twenty-five Thousand Dollars (\$25,000.00) for the State of West Virginia, every political subdivision of the State of West Virginia, every administrative agency, every municipality, and every county board of education.

Code 5-22-1 requires competitive bidding for every construction project in excess of Twenty-five Thousand Dollars (\$25,000.00). Code 5-22-1 provides in full as follows:

"Bidding required; government construction contracts to go to qualified responsible bidder; exceptions.

"As used in this section, 'the state and its subdivisions' means the state of West Virginia, every political subdivision thereof, every administrative entity that includes such a subdivision, all municipalities and all county boards of education.

"The state and its subdivisions shall except as provided in this section solicit competitive bids for every construction project exceeding twenty-five thousand dollars in total cost. Following the solicitation of such bids, the construction contract shall be awarded to the lowest qualified responsible bidder, who shall furnish a sufficient performance and payment bond: Provided, That the State and its subdivisions may reject all bids and solicit new bids on said project.

"Nothing in this section shall apply to work performed on construction or repair projects by regular full-time employees of the state or its subdivisions, nor shall anything in this section prevent students enrolled in vocational educational schools from being utilized in construction or repair projects when such use is a part of the students training program.

"Nothing herein shall apply to emergency repairs to building components and systems. For the purpose of this paragraph, emergency repairs means repairs that if not made immediately will seriously impair the use of such building components and systems, or cause danger to those persons using such building components and systems.

"Nothing herein shall apply to any situation where the state or a subdivision thereof shall come to an agreement with volunteers, or a volunteer group, whereby the governmental body will provide construction or repair materials[,] architectural, engineering, technical or any other professional services and the volunteers will provide the necessary labor without charge to, or liability upon, the governmental body."

Code 33-1-10(f) provides, in full, as follows:

"(f) Surety--Surety insurance includes:

"(1) Fidelity insurance, which is insurance guaranteeing the fidelity of persons holding positions of public or private trust;

"(2) Insurance guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship * * *;

"(3) Insurance indemnifying banks, bankers, brokers, financial or moneyed corporations or associations against loss, resulting from any cause, of bills of exchange, notes, bonds, securities, evidences of debt, deeds, mortgages, warehouse receipts or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semiprecious stones, including any loss while they are being transported in armored motor vehicles or by messenger, but not including any other risks of transportation or navigation, and also insurance against loss or damage to such an insured's premises or to his furnishings, fixtures, equipment, safes and vaults therein, caused by burglary, robbery, theft, vandalism or malicious mischief, or any attempt to commit such crimes; and

"(4) Title insurance, which is insurance of owners of property or others having an interest therein, or liens or encumbrances thereon, against loss by encumbrance, defective title, invalidity or adverse claim to title."

Code 33-12-7 provides in full as follows:

"No contract of insurance covering a subject of insurance, resident, located, or to be performed in this State, shall be executed, issued or delivered by any insurer unless the contract, or in the case of an interstate risk a counter-signature endorsement carrying full information as to the West Virginia risk, is signed or countersigned in writing by a licensed resident agent of the insurer except that excess line insurance shall be countersigned by a duly licensed excess line broker. This section does not apply to: Reinsurance; credit insurance; any contract of insurance covering the rolling stock of any railroad or covering any vessel, aircraft or motor carrier used in interstate or foreign commerce, or covering any liability or other risks incident to the ownership, maintenance or operation thereof;

any contract of insurance covering any property in interstate or foreign commerce, or any liability or risks incident thereto. Countersignature of a duly licensed resident agent of the company originating a contract of insurance participated in by other companies as cosureties or co-indemnitors shall satisfy all countersignature requirements in respect to such contract of insurance."

Code 33-19-1 provides in full as follows:

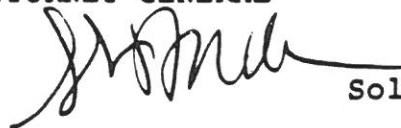
"When surety insurance, as defined in section ten [§ 33-1-10], article one of this chapter, is required of any person by a court or governmental body of the State of West Virginia, such insurance shall be provided only by persons licensed in West Virginia to transact surety insurance."

It is the opinion of the Attorney General that any bond required to be submitted as a condition of statute or as a condition of the bid documents must be countersigned by a licensed, resident agent. Further, a governmental entity does not have the authority to waive a mandatory requirement established by statute. Burns Intern. Sec. Services, Inc. v. Department of Transp. 671 P.2d 446 (Hawaii 1983); see Buffalo Forge Co. v. Abrams, 79 A.D.2d 140 (N.Y. 1981). It is additionally the opinion of the Attorney General that the submission of a bond signed by a licensed resident agent is a condition precedent to acceptance of a bid that requires submission of a bond by statute or by the conditions of the bid. A.A.B. Electric, Inc. v. Stevenson Pub. School Dist. No. 303, 491 P.2d 684 (Wash. 1971); Board of Ed. of Chillicothe City School Dist. v. Sever-Williams Co., 258 N.E.2d 605 (Ohio 1970).

Very truly yours,

CHARLES G. BROWN
ATTORNEY GENERAL

By



Solicitor General

STEPHEN D. HERNDON

CGB/SDH/mlk