

## **N.D.A.G. Letter to Enget (Jan. 5, 1989)**

January 5, 1989

Mr. Wade Enget  
Mountrail County State's Attorney  
P.O. Box 369  
Stanley, ND 58784

Dear Mr. Enget:

Thank you for your letter of December 27, 1988, in which you requested an Attorney General's opinion as to whether it is necessary to hire an architect prior to the replacement and cleanup of materials containing asbestos in an existing school structure. You also asked whether the school district could hire a local contractor to remove the asbestos rather than going through the sealed bid process.

The requirements for the construction of public buildings are set forth in N.D.C.C. title 48. Specifically N.D.C.C. § 48-02-02 states, in relevant part, as follows:

48-02-02. Prerequisite to building and repair by contract --  
Exceptions. If in altering, repairing, or constructing any building belonging or appertaining to any of the public institutions of the state, or to any county, city, park district, school district, or other political subdivision of the state, or in making any improvement connected with the building, the total estimated cost of all work involved amounts to more than fifty thousand dollars for the completed project, the governing body of the public institution, municipality, or political subdivision shall procure plans, drawings, and specifications for the work, upon competitive bids or otherwise as the board may deem necessary. In all cases where the estimated cost of the work exceeds fifty thousand dollars, the plans, drawings, and specifications must be procured from a licensed architect;

In accordance with this statute, the Plaza School District would need to hire an architect if the building improvement costs exceeded fifty thousand dollars for the completed project.

Your second question is whether the school district could hire a local contractor to remove the asbestos, thus eliminating the step of securing bids in the manner required by N.D.C.C. §§ 48-02-01 through 48-02-03.

In 1987, the North Dakota State Legislature amended N.D.C.C. § 48-02-03 to provide for "emergency" situations that may arise. The relevant portion of N.D.C.C. § 48-02-03 states that "[t]he requirements of this section [governing the procurement of bids] may be waived by the governing board if it determines that an emergency situation exists requiring the prompt destruction, demolition, or repair of an existing business, facility, or portion thereof, and a contract may be made for such prompt destruction, demolition, or repair without

seeking bids." (Emphasis supplied.) Unless the school board determines an emergency situation does exist, the bid requirements of N.D.C.C. ch. 48-02 are applicable and should be followed.

I cannot determine for the board whether the asbestos removal problem at the Plaza School District constitutes an emergency situation. The statute clearly places the authority for making this determination with the governing board of the school district in this case. However, the school board would be cautioned that the emergency waiver provisions of N.D.C.C. § 48-02-03 should be used only in those bona fide emergency situations. The action of the board in implementing the emergency waiver provision can be contested in court if the board acts without sufficient cause in concluding that an emergency situation exists.

I hope this information has been helpful to you.

Sincerely,

Nicholas J. Spaeth

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