

## **N.D.A.G. Letter to Scherber (May 14, 1987)**

May 14, 1987

Honorable Kit Scherber  
State Representative  
922 11th Street North  
Fargo, North Dakota 58102

Dear Representative Scherber:

Thank you for your letter of March 13, 1987, which was received by our office on April 21, 1987. You request my opinion on whether the city of Fargo's contract with a private bridge company is in conformity with the provisions of N.D.C.C. § 40-05-01(57). You also request clarification as to the contract's commencement date and its duration.

The agreement in question was executed by the city of Fargo, the city of Moorhead, and the Bridge Company, a North Dakota corporation, on May 19, 1986. The purpose of the agreement is the construction and operation of a private toll bridge over the Red River of the North between the cities of Fargo and Moorhead. The bridge will be owned and operated by the private Bridge Company. The contract requires that the cities acquire the necessary rights-of-way and improve the affected avenues so that the bridge is operational. The costs of the rights-of-way acquisitions will be paid by the company but the cities will assume responsibility for the costs and expenses for improvements to and maintenance of the affected avenues. The bridge is required to be constructed in accordance with the terms and conditions of the permit issued by the District Corps of Engineers and other applicable laws.

Initially, I will address your questions as to the contract's commencement date and its duration. The contract's commencement date is not clearly set forth in the agreement. One clause of the agreement states that it is effective upon execution whereas another clause states that the contract commences when the bridge begins its operations. The duration of the contract is equally ambiguous with one clause providing that the term of the agreement shall be for a period of 20 years and another clause providing that the contract endures for a period of 25 years.

General contract law requires that if an agreement is unambiguous and the parties' intentions can be ascertained from the writing alone, without reference to extrinsic evidence, the interpretation of the contract is a question of law without regard to extrinsic evidence. Ray Co. v. Johnson, 325 N.W.2d 250, 251-252 (N.D. 1982). However, if the agreement is ambiguous and the parties' intentions cannot be determined from the writing alone, and reference must be made to extrinsic evidence to determine the parties' intent, the interpretation of the contract is a factual question. *Id.*

My analysis of the contract in question indicates that it is sufficiently ambiguous whereby extrinsic evidence is necessary to determine the parties' intentions. Inasmuch as the Office of Attorney General is not able to render opinions on factual questions, I cannot assist you in clarifying the contract's commencement date or its duration. If the parties to the contract concur with my determination that the agreement is ambiguous in these respects, they may wish to clarify it through amendments.

You also ask whether the contract's term (20 or 25 years) violates N.D.C.C. § 40-05-01(57) which states as follows:

57. Franchises. To grant franchises or privileges to persons, associations, or corporations, any such franchise, except where given to a railroad company, to extend for a period of not to exceed twenty years, and to regulate the use of the same, franchises granted pursuant to the provisions of this title not to be exclusive or irrevocable but subject to the regulatory powers of the governing body.

[Emphasis supplied.] Obviously, if the parties intended that the contract have a duration of 20 years, the 20 years limitation of N.D.C.C. § 40-05-01(57) is not relevant. On the other hand, if the correct interpretation of the contract is that its duration is 25 years, then it is necessary to further discuss whether the bridge project constitutes a "franchise" within the meaning of N.D.C.C. § 40-05-01(57).

The North Dakota Century Code does not define the term "franchise." Other legal authority has defined the term "franchise" as follows:

In a legal or narrower sense, the term "franchise" is more often used to designate a right or privilege conferred by law, and the view taken in a number of cases is that to be a franchise, the right possessed must be such as cannot be exercised without the express permission of the sovereign power -- that is, a privilege or immunity of a public nature which cannot be legally exercised without legislative grant. It is a privilege conferred by government on an individual or a corporation to do that "which does not belong to the citizens of the country generally by common right." . . . In this connection, the term "franchise" has sometimes been construed as meaning a grant of a right to use public property, or at least the property over which the granting authority has control.

36 Am. Jur. 2d, Franchises, §1 (1968).

Provided that the necessary permits are obtained and the bridge is constructed in conformance with applicable law, there are no legal impediments to private parties constructing a bridge. Thus, the cities of Fargo and Moorhead are not granting a "franchise," as defined above, by their contractual agreement with the Bridge Company. The fact that the cities of Fargo and Moorhead have various contractual responsibilities that must be

satisfied if the bridge is to be operational does not affect the analysis as to whether a franchise has been granted in this matter.

If you have any further questions on this matter, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

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cc: Mayor Jon Lindgren