

OPINION
65-131

June 24, 1965 (OPINION)

The Honorable K. O. Nygaard

Commissioner of Insurance

RE: Insurance - Public Buildings - Bids for Reinsurance

This is in response to your request for an opinion relating to reinsurance of risks under the provisions of section 26-24-22, as amended, of the North Dakota Century Code.

This section was amended by Senate Bill No. 340 of the 39th Legislative Assembly, at which time some substantive and procedural changes were made. Senate Bill No. 340 was not an emergency measure and would not have gone into effect until July 1, 1965. Earlier we had advised in response to your inquiry that the provisions of Senate Bill No. 340 could not be implemented in June of 1965. In the meantime, an extraordinary session of the North Dakota Legislature was held, at which time Senate Bill No. 9 was enacted further amending section 26-24-22. Senate Bill No. 9 is an emergency measure and was passed by the necessary two-thirds majority and was delivered to the Governor on June 21, 1965. The bill was signed by the Governor on June 24, 1965, at which time it became law. You then submit the following:

My question is whether the reinsurance to be procured for the coming biennium will be according to the captioned bill, and, if so, whether a notice calling for bids to be received until and including the nineteenth day of July, 1965, would be in substantial compliance with Senate Bill No. 9. A copy of such notice is enclosed. The Bismarck Tribune informed us today, it would be impossible to publish the notice in question until Friday, June 25, 1965. Publishing on that date, however, would allow the competitive bidding the law contemplates, provided bids are received until July 19, 1965. The insurance coverage to be contracted for would be for the two-year period commencing August 1, 1965, and Mr. Sand has indicated orally this procedure would be substantial compliance with the bill."

The legislative action taken clearly indicates that it was the intent of the Legislature to immediately put into operation the provisions of Senate Bill No. 340 of the Thirty-ninth Legislative Assembly. The technical application of the provisions of section 26-24-22, as in effect at the various times material herein, (including the amendments contained in Senate Bill No. 9), would bring about some absurd results. As an example, the insurance commissioner would have to advertise under the provision of section 26-24-22 as constituted before either the amendments contained in Senate Bill No. 340 and Senate Bill No. 9 would be effective, but the awarding and letting of bids would be under the new provisions contained in Senate Bill No. 340 and Senate Bill No. 9. Aside from the practical difficulty in

attempting to comply with the two sets of standards, it is doubtful that the end result would constitute a legal and binding transaction or contract for reinsurance. The notice and advertisement would be under one standard and the award or contract would be under another standard. The basic requirements of a contract would be distorted, if not missing.

There is a basic principle of law that if strict compliance cannot be met because of factors over which the officer has no control that substantial compliance will be satisfactory. This is an instance where such principle of law would come into full operation.

In examining the provisions of section 26-24-22, as amended by Senate Bill No. 340 of the Thirty-ninth Legislative Assembly and Senate Bill No. 9 as amended by the extraordinary session, it is noted that competitive bidding is one of the underlying considerations of letting contracts for reinsurance. In order to satisfy this condition it is necessary that potential bidders be given adequate notice. It is also essential that the notice be given at such time and place so that other provisions of section 26-24-22 can be carried out. The reinsurance contract is for a two-year period, commencing on the first day of August. The proposed notice which is attached hereto allows sufficient time for those insurance companies who are interested to submit bids and to permit same to be evaluated and the award made before August first.

In examining the various provisions as to the procedural matter, it is noted that it is physically impossible to comply technically with some of the provisions contained in either Senate Bill No. 340 or Senate Bill No. 9 as to the dates for advertising for bids. This is a situation which developed over which the insurance commissioner had no choice. Consequently, it is incumbent upon the insurance commissioner to do the next best thing to substantially comply with the provisions of law.

We have examined the proposed notice and under the circumstances recited herein, it is our opinion that the notice and proposed procedure is in substantial compliance with the present law, section 26-24-22, as amended, of the North Dakota Century Code, and that if the awards will be made pursuant to the provisions of said section they will be legal and binding.

HELGI JOHANNESON

Attorney General