

**N.D.A.G. Letter to Patrie (Feb. 20, 1987)**

February 20, 1987

Mr. William Patrie  
Director  
North Dakota Economic  
Development Commission  
Liberty Memorial Building  
Bismarck, ND 58505

Dear Mr. Patrie:

Thank you for your memorandum of January 20, 1987, in which you inquire whether the Economic Development Commission (EDC) may accept a user fee from North Dakota companies for the purpose of assisting these businesses with the marketing and selling of their goods and services to the federal government. You also inquire whether such funds can be deposited into a special account rather than going into the state's general fund.

Prior to ascertaining appropriate funding sources and fiscal management of these funds, it is necessary to discuss the authority of EDC to establish a program that would assist North Dakota businesses in procuring federal contracts. N.D.C.C. 54-34-06 states in relevant part as follows:

54-34-06. DUTIES OF THE DIRECTOR. The director, under the supervision of the governor and subject to legislative appropriation, shall:

\* \* \*

2. Plan, execute, and direct a program of publicity, research, and agricultural and industrial promotion which will:

\* \* \*

- c. Assist in improving the business and agricultural climate of North Dakota to encourage the growth and development of business and industry.

\* \* \*

4. Cooperate with departments and agencies of the federal government and of other states, and with departments, agencies, institutions, and political subdivisions of this state, and with associations, corporations, and individuals upon such terms as may be agreed upon in providing programs of

advertising, promotion, or research which will advance the economic development of the state.

\* \* \*

Based on the above statutory authority, it is my opinion that the contemplated federal contract assistance program is within the scope of EDC's authority.

Your memorandum indicates that the Legislature has not provided funds for a federal contract assistance program but that private North Dakota businesses are willing to pay user fees that would fund the program. The director of EDC is authorized to "[r]eceive and accept from any source, including agricultural and industrial development funds of cities and counties, money, property, services, or other things of value, to be held or used for the purpose tendered." N.D.C.C. § 54-34-06(5).

N.D. Const. Art. X, § 12, requires that "all public moneys from whatever source derived, shall be paid over monthly by the public official, employee, agent, agent director, manager, board, bureau, or institution of the state receiving the same, to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the Legislature. .

The requirements of N.D. Const. Art. X, § 12 are applicable to all "public moneys" of the state. The term "public moneys" has been liberally construed by the judiciary. Langer v. State, 284 N.W. 238 (N.D. 1939) (funds for certain specified services "appropriated" in N.D. Const. Art. X, § 12 are "public moneys"); Dowe v. Egan, 48 A.2d 735, 738 (Conn. 1946) ("the unemployment compensation benefit fund constitutes 'public moneys' as those words are used in the constitution"); Hunn v. New York State Teachers Retirement System, 35 N.Y.S.2d 49, 53 (NY Sup. Ct. 1942) (funds of the teachers retirement system are "public moneys"); Simms v. Moeur, 19 P.2d 679, 685 (Ariz. 1933) (workmens compensation fund constitutions public money) ("It is not the source of the money but its ownership, or the fact that it is received or held by officers of the state and its political subdivisions in their official character, that makes it 'public money'"); Board of County Comm'rs v. Idaho Health Facilities Authority, 531 P.2d 588, 599 (Idaho 1974) (proceeds from the sale of Health Authority bonds are "public money").

The fact that the Legislature lacks the authority to appropriate certain specific funds was rejected by the North Dakota Supreme Court as a basis for concluding that the funds are not "public moneys" subject to N.D. Const. Art. X, § 12:

It is of no consequence whether moneys are available for appropriation for general purposes or whether they are collected, and must be expended, for certain designated purposes. The fact remains that the laws under which moneys in these several funds have been, are being, and will be collected, are general state laws, and the moneys in these funds have been collected, and must be expended, for certain public purposes designated in the acts under which they have been collected. . . . There is as much reason for

safeguarding the expenditure of moneys held by the state in trust for expenditure for certain designated purposes as there is to place safeguards around the expenditure of moneys collected for general purposes.

Langer v. State, 284 N.W. 238 at 248.

Based on the foregoing legal authority, it is my opinion that the user fees received by EDC from the various private North Dakota businesses would be "public moneys" that must be paid over to the State Treasurer on a monthly basis and disbursed only pursuant to legislative appropriation. The fact that the money is entrusted to EDC for a specific purpose does not exempt it from the requirements of N.D. Const. Art. X. § 12.

Neither EDC's current appropriation bill, 1985 N.D. Sess. Laws 19, nor N.D.C.C. § 54-34-06(5) provide the necessary appropriation authority for expending funds collected under a user fee program. N.D.C.C. § 54-34-06(5) contemplates a pass through mechanism whereby EDC is merely a conduit of funds. Therefore, although it is not authorized to directly operate a federal contract assistance program, EDC could coordinate an arrangement between North Dakota businesses and a private contractor who would provide the desired services to the private businesses.

If such an arrangement is feasible, assistance and act as a conduit of private businesses and the contractor.

If you have any further questions on do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

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