

New Mexico Society of Architects
C/O Mr. Kenneth S. Clark, F.A.I.A.
208 Delgado Street
Santa Fe, New Mexico
Gentlemen:

This letter is written in response to your request for a legal opinion with respect to whether a School Board or a Board of County Commissioners may legally contract to pay an architect for plans and specifications for constructing a building even though the bond issue out of which such building is to be constructed fails to pass. It is our understanding that School Boards as well as Boards of County Commissioners frequently take the position that no payment may be made for plans and specifications except out of the proceeds of the bond issue relating to the project with the result that the architectural fee must of necessity be contingent, rather than certain.

In our opinion, there is no legal foundation for such a position and School Boards and Boards of County Commissioners may enter into a valid contract to pay an architect for plans and specifications for projects without regard to whether the bond issue relating to the project is passed by the voters. We will separately consider the authority for such payment by School Boards and by Boards of County Commissioners.

Public schools may pay for architectural services which are considered preliminary in nature, that is, for surveys, feasibility studies, cost estimates and preliminary plans, under Budget Classification 120.3 in the General Control budget. For other architectural services, budget provisions may be made under classifications 1210.1, 1220.1, 1210.2, 1220.2 and 1230.

The basic authority for the foregoing is found in the Public School Finance Act, Sections 77-6-1 through 77-6-46, New Mexico Statutes Annotated, 1953 Compilation. In particular, Section 77-6-7 establishes the form of budgeting, 77-6-46 requires expenditures to be in conformity with the budget, and 77-6-5 gives the effect of law to accounting and budgeting procedures contained in the Manual of Procedure issued by the Public School Finance Division of the Department of Finance and Administration. The budget classification numbers listed above are designations set forth by the Manual of Procedure, which was initially issued in 1965 and supplemented in 1967.

A Board of County Commissioners has general authority "To build . . . all county buildings . . ." under section 15-37-15 and " . . . the care of the county property and the management of the interest of the county in all cases where no other provision is made by law" under section 15-37-16. Its budget is, however, subject to approval by the Local Government Division of the State Department of Finance and Administration. See Section 11-2-57. This division advises that a line item in the general fund may be placed in the budget by a Board of County Commissioners. Such request in the budget could be made by a Board of County Commissioners in advance of the election on the bond issue and, if the issue passes, the architectural fees would be paid from the proceeds of the bond issue and the money in the line item in the general fund would simply not be used. Alternatively, after a bond issue fails, the Board of County Commissioners could request approval of an amendment to the budget from the Local Government Division of the State Department of Finance and Administration.

Both in the case of bond issues for school construction and for county projects, it seems elementary that the respective boards must have authority to incur preliminary expenses, including the employment of architects. The Legislature of the State of New Mexico must have foreseen that certain preliminary expenses are an absolute necessity in the case of an election on a bond issue. For example, legal advertising in advance of an election is specifically required, and the newspaper carrying the advertising demands and receives its fee in advance of the election. The services of an architect would seem to be equally essential to the presentation of a bond issue to the electorate. Accordingly, the authority to incur expenses preliminary to an election on a bond issue is inherent in the statutes providing for such elections.

In conclusion, we see no necessity for architectural fees to be made contingent upon the passage of a bond issue.

Sincerely yours,

Joseph A. Sommer, McKenna & Sommer, Attorneys

**Contingent fee
for construction
of School and
County buildings
- A legal opinion**



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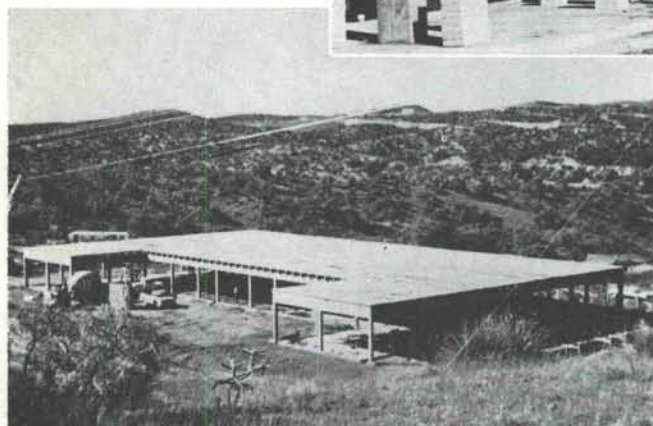


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