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OPINION
OF
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Opinion No. 05-02

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TO: Honorable Leonard Lee Rawson
State Senator
P.O. Box 996
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RE: SUBCONTRACTOR BONDING REQUIREMENTS ON PUBLIC WORKS BUILDING PROJECTS

QUESTIONS:

1. Does Senate Bill 814, which is 2005 N.M. Laws, Ch. 99, apply to all tiers of subcontractors, e.g., first, second or third, even if the second or third tiers are not in privity of contract with the primary contractor?

2. In the context of various stages of the bidding, award and contracting process, at which point does Senate Bill 814 apply?

CONCLUSIONS:

1. We believe that a court, in the absence of contrary regulations, would likely conclude that Senate Bill 814 applies only to a subcontractor that contracts directly with the prime contractor.

2. We believe that a court would likely apply Senate Bill 814 in a prospective manner to subcontractor contracts executed after the effective date and not to those executed before the effective date.

DISCUSSION:

Senate Bill 814, now 2005 N.M. Laws, Ch. 99, (hereinafter "Chapter 99"), enacts a new section of the Procurement Code:

> BONDING OF SUBCONTRACTORS: A subcontractor shall provide a performance and payment bond on a public works building project if the subcontractor's contract for work to be performed on a project is fifty thousand dollars ($50,000) or more.

Chapter 99 does not define "subcontractor." The Procurement Code, NMSA 1978, §§ 13-1-78 to –199 (1984 as amended through 2005), does not define "subcontractor." Nor have regulations been adopted under the Code to address this specific issue.[1] Generally, however, "[a] subcontractor may be briefly described as one who has entered into a contract … for the performance of an act, with a person who has already contracted for its performance [citing cases]." Staley v. New, 56 N.M. 756, 759, 250 P.2d 893, 895 (1952). This general description of "subcontractor" could encompass "sub-subcontractors" of any "tier" designation. The issue is thus whether such an all-encompassing designation of any and all tiers of subcontractors comports with legislative intent, particularly as evidenced by similar legislation pertaining to subcontractor bonding and as influenced by policy considerations respecting general, i.e. prime, contractor bonding requirements on public works projects.

A court "begin[s] the search for legislative intent of a statute by looking 'first to the words chosen by the Legislature and the plain meaning of the Legislature's language'." State v. Davis, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064 (quoting State v. Martinez, 1998-NMSC-023, ¶ 8, 126 N.M. 39, 966 P.2d 747). Nonetheless, a court:

> '[m]ust exercise caution in applying the plain meaning rule.' State ex rel. Helman v. Gallegos, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994). While we do not ignore the language used by the Legislature, we must ensure that words are not interpreted outside of any relevant legislative context. Thus, we will interpret statutes as a whole and look to other statutes in pari materia in order to determine legislative intent. See Roth v. Thompson, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992).

[1] The secretary of the General Services Department ("GSD") is authorized to adopt reasonable administrative and procedural rules and regulations as may be necessary to carry out the duties of the department and its divisions. NMSA 1978, § 9-17-5 (E). To date, the GSD has not adopted regulations to implement Chapter 99. If it were to adopt regulations that required that "all tiers" of subcontractors be bonded, such regulation would likely control, given the ambiguity of Chapter 99. Courts often defer to the expertise of administrative agencies authorized to implement and administer a law. Gonzales v. Allstate Ins. Co., 122 N.M. 137, 142, 921 P.2d 944, 949 (1996); Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶ 30, 125 N.M. 786, 965 P.2d 370. In the absence of contrary implementing regulations, we proceed in this Opinion to analyze the law without any express interpretive guidance from GSD.

State v. Martinez, ¶ 9, supra. "Statutes on the same general subject should be construed by reference to each other, see Runyan v. Jaramillo, 90 N.M. 629, 631, 567 P.2d 478, 480 (1977), the theory being that the court can discern legislative intent behind an unclear statute by reference to similar statutes where legislative intent is more clear." State v. Ogden, 118 N.M. 234, 243, 880 P.2d 845, 854, cert. denied 513 U.S. 936 (1994).

With respect to subcontractor bonding, the Subcontractors Fair Practices Act, NMSA 1978, §§ 13-4-31 to –42 (1988 as amended through 2005), employs a clear and limited definition of "subcontractor." As used in that Act, the term "contractor" is defined to mean the "prime contractor on a public works construction project," and the term "subcontractor" is defined to mean "a contractor who contracts directly with the contractor." § 13-4-33 (A) and (B). Therefore, under the Subcontractors Fair Practices Act, sub-subcontractors, i.e. second, third and subsequent tiers of subcontractors, are not "subcontractors" within the meaning of that Act.

Section 13-4-37 of the Subcontractors Fair Practices Act provides for bonding of subcontractors, meaning only "first tier subcontractors," as follows:

> A. It is the responsibility of each subcontractor submitting a bid to a contractor to be prepared to submit a faithful performance and payment bond if so requested by the contractor.
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> B. In the event that any subcontractor submitting a bid to a contractor does not, upon the request of the contractor and at the expense of the contractor … furnish to the contractor a bond … wherein the contractor is named the obligee, guaranteeing prompt and faithful performance of the subcontract and the payment of all claims for labor and materials furnished or used in and about the work to be done and performed under the subcontract, the contractor may reject the bid and make a substitution of another subcontractor…. Such bond may be required at the expense of the subcontractor only if the contractor in his written or published request for subcontract bids:
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> (1) specifies that the expense for the bond shall be borne by the subcontractor; and
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> (2) clearly specifies the amount and requirements of the bond.

Chapter 99, of course, not only provides for, but requires subcontractor bonding in the circumstances described by Chapter 99.[2] Because both Chapter 99 and the

[2] The Fiscal Impact Report, prepared by the Legislative Finance Committee with respect to Chapter 99, observed that SB 814, according to the Public School Facilities Authority, would make mandatory permissive subcontractor bonding provisions of the Subcontractors Fair Practices Act. In State ex rel. Helman v. Gallegos, 117 N.M. 346, 355, 871 P.2d 1352, 1361 (1994), the Supreme Court of New Mexico permitted, in the factual context of that case, the use of contemporaneous documents, such as a fiscal impact report, presented to and presumably considered by the legislature during the course of enactment of a statute.

Subcontractors Fair Practices Act relate to subcontractor bonding on public works projects, these statutory provisions may be read harmoniously together, to give maximum effect to each, and considered in pari materia. State v. Davis, 2003-NMSC-022, ¶ 12, 134 N.M. 172, 74 P.3d 1064; Gordon v. Sandoval County Assessor, 2001 NMCA-044, ¶19, 130 N.M. 573, 28 P.3d 1114. Chapter 99 applies only to public works building projects. The Subcontractors Fair Practices Act also applies to public works building projects.[3] That Act does not apply to other projects, such as highway projects.[4] That "buildings" are considered "public works" is evidenced by Section 13-4-11 of the Public Works Minimum Wage Act, NMSA 1978, §§ 13-4-10 to –17 (1963 as amended through 2005), which applies the "prevailing wage" requirements to contracts that satisfy a certain monetary threshold and are "for the construction, alteration, demolition or repair … of public buildings, public works or public roads…."[5]

In addition to the fact that the Subcontractors Fair Practices Act defines "subcontractor" to mean only the subcontractor that contracts directly with the general, or prime, contractor, that Act was amended, also during the 2005 legislative session, at § 13-4-36, to add an additional circumstance in which substitution of the listed subcontractor may be made. See Senate Bill 806, now 2005 N.M. Laws, ch. 98 (hereinafter "Chapter 98").

Significantly, in a section related to public works contracts, Chapter 98 struck existing "all subcontractor tier" language, by amending § 13-4-13.1 of the Public Works Minimum Wage Act, pertaining to registration requirements. That language, which the Legislature struck, is: "All tiers of subcontractors shall be subject to the requirements of this subsection." This amendment reflects that the Legislature is aware of subcontractor "tiers," choosing to include, expressly, "all tiers of subcontractors" or to strike that inclusion, as it sees fit. Although the Legislature could have thus specified in Chapter 99 that its provisions were expressly subject to "all tiers of subcontractors," as it had previously done in § 13-4-13.1, the Legislature did not so specify in Chapter 99. This suggests Chapter 99 was not intended to apply to all tiers of subcontractors. Stated otherwise, if the Legislature had wanted to do so, it could have stated so directly and its failure to do so—when it did so in another law—suggests Chapter 99 does not apply to all tiers of subcontractors.

Furthermore, since the Legislature in 2005 struck the term "all tiers of subcontractors" in Chapter 98, it seems incongruous to conclude that the bare term "subcontractor" in Chapter 99

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[3] See § 13-4-32 (referring to "construction, alteration and repair of "public works projects"); § 13-4-33 (A) (defining "contractor" as the "prime contractor on a public works construction project"); § 13-4-34 (A) (relating to any using agency taking bids for "any public works construction project").

[4] Section 13-4-35 provides: "With the exclusion of that portion of work covering street lighting and traffic signals, the Subcontractors Fair Practices Act [13-4-31 to 13-4-42 NMSA 1978] shall not apply to contracts for the construction, improvement or repair of streets or highways, including bridges, underground utilities within easements including but not limited to water lines, sewer lines and storm sewer lines."

[5] Rules issued by the New Mexico Department of Labor, Labor and Industrial Division, Public Works Bureau, classify construction types differently, "highway," being classified as "Type A," and general "building," being classified as "Type B." NMAC 11.1.2.11.

should be interpreted to mean a different term, i.e., "all tiers of subcontractors," that the Legislature specifically struck in the companion 2005 legislation it adopted in Chapter 98.

Chapter 98 also amends the Procurement Code at § 13-1-105 to add: "In addition to the requirement for the prime contractor and subcontractors to be registered as provided in Section 13-4-13.1 NMSA 1978," [bids must be evaluated based on the invitation for bids]. It further amends that section to add:

> A bid submitted by a prime contractor that was not registered as required by Section 13-4-13.1 NMSA 1978 shall not be considered for award. A bid submitted by a registered prime contractor that includes any subcontractor that is not registered in accordance with that section may be considered for award following substitution of a registered subcontractor for any unregistered subcontractor in accordance with Section 13-4-36 NMSA 1978.

(Emphasis added). Section 13-4-36 is part of the Subcontractors Fair Practices Act, which limits, by definition, the meaning of subcontractor to that individual or entity which has a contract with the prime contractor. That further reinforces why the Procurement Code and the Subcontractors Fair Practices Act should be read in pari materia.

Statutes enacted at same legislative session are peculiarly in pari materia. State v. Fidelity & Deposit of Maryland, 36 N.M. 166, 9 P.2d 700 (1932); Mays v. Bassett, 17 N.M. 193, 125 P.609 (1912) (all laws enacted at the same session of the legislature relating to the same subject-matter are to be construed together).

Moreover, in another provision of the Procurement Code, the Legislature has expressly recognized "tiers" of subcontractors. Section 13-1-98 distinguishes between "subcontractor" and "tiers" of subcontractors: "Upon a showing that a subcontractor made a kickback to a prime contractor or a higher-tier subcontractor in connection with the award of a subcontract or order thereunder, it is conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the state agency or a local public body…." (Emphasis added).

We cannot assume, given the Legislature's conscious use of the term "tiers," when discussing subcontractors in other statutes, that it intended that the bare term "subcontractor," as used in Chapter 99, should be construed in an all-encompassing manner to mean "all tiers" of subcontractors. See Gutierrez v. West Las Vegas School Dist., 2002-NMCA-068, ¶ 15, 132 N.M. 372, 48 P.3d 761 ("The Legislature is presumed to know existing statutory law and to take that into consideration when enacting new law").

We understand that the State is already fully protected by the general contractor's performance and payment bond, the cost of which is passed on to the State. Chapter 99 will, in those circumstances described by the statute, provide protection for, or at least a remedy to, the general contractor should its direct subcontractors fail to perform. The general contractor remains obligated to perform its contract with the public entity. Indeed, if the purchase of a subcontractor bond would improve the bond rating of the general contractor, the State might incur lower

bonding costs that the general contractor passes on to the State.[6] Beyond these attributes, we are unable to discern a broader legislative policy basis supporting Chapter 99.

For all these reasons, based upon applying familiar rules of statutory construction and an effort to give effect to legislative policy, we believe that a court, in the absence of authorized contrary regulations adopted by the agency charged with implementing the law, would likely conclude that Chapter 99 applies only to a subcontractor that contracts directly with the prime contractor.

The second question concerns the applicability of Chapter 99 in view of its effective date. Chapter 99 is effective on June 17, 2005. N.M. Const. art. IV, § 23 (unless otherwise specified, laws go into effect ninety days after adjournment of the legislature, except for general appropriations and emergency legislation).

In particular, the second question concerns whether Chapter 99 applies in the following circumstances:

(1) a subcontract is bid before the effective date and the general contract and subcontract are awarded and signed on or after the effective date;

(2) a subcontract is bid before the effective date and the general contract is awarded before the effective date but the subcontract is awarded and the general contract and subcontract are signed on or after the effective date;

(3) a subcontract is bid before the effective date and the general contract and subcontract are awarded before the effective date but are signed on or after the effective date;

(4) a subcontract is bid before the effective date, the general contract and subcontract are awarded before the effective date, the general contract is signed before the effective date but the subcontract is signed on or after the effective date; and

(5) a subcontract is bid before the effective date, the general contract and subcontract are awarded before the effective date and the general contract and subcontract are signed before the effective date.

Because the Legislature has not specified an applicability date for the situations you pose, ambiguities can arise in trying to answer this question. Cf. NMSA 1978 § 13-4-17 (1937) [of the Public Works Minimum Wage Act]: "This act [13-4-11 to 13-4-17 NMSA 1978] shall not effect [affect] any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding at the time of the passage of this act." 1937 N.M. Laws, Ch. 179, § 5.

As a general rule, statutes operate prospectively unless the Legislature manifests a clear intent to the contrary. Gallegos v. Pueblo of Tesuque, 2002-NMSC-012, ¶ 33, 132 N.M. 207, 46 P.3d 668. If the application of a "newly enacted law retrospectively would diminish rights or increase liabilities that have already accrued," then prospective application may be required by the

[6] See Fiscal Impact Report.

Constitution. Id. (quoting Swink v. Fingado, 115 N.M. 275, 279, 850 P.2d 978, 982 (1993)). See N.M. Const. art. II, § 19 ("No ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature."). A statute is considered retroactive if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions. Gadsden Federation of Teachers v. Bd. of Educ. of Gadsden Independent School Dist., 122 N.M. 98, 101, 920 P.2d 1052, 1055 (Ct. App. 1996) (holding that amendment to School Personnel Act extending tenure beyond certified school instructors to almost all school employees did not protect non-certified school employees who were terminated a few days after the effective date of the amendment, when termination was authorized by the terms of their contracts that predated the amendment). See also State ex rel. Coll v. Carruthers, 107 N.M. 439, 447, 759 P.2d 1380, 1388 (1988) (upholding line item veto of appropriation that was intended to alter terms of existing employment contracts between private providers and state agency); Rubalcava v. Garst, 53 N.M. 295, 206 P.2d 1154 (1949) (refusing to apply, based on the article II, § 19, a later-enacted statute that would have operated to invalidate a pre-existing oral contract to devise property, where the later statute was enacted after the decedent's death and after performance of the contract). Cf. Los Quatros, Inc. v. State Farm Life Ins. Co., 110 N.M. 750, 800 P.2d 184 (1990) (upholding retroactive application of a statute to pre-existing mortgages that prohibited enforcement of a prepayment penalty, because the statute was sufficiently justified by the significant and legitimate public purpose of promoting alienability of land).

Thus, unless a court determined that Chapter 99 was susceptible to retroactive application based on significant and legitimate policy purposes, Chapter 99 would apply prospectively only, and, therefore, only to subcontractor contracts entered into, i.e., signed by all parties and thereby in effect, on or after the Act's effective date of June 17, 2005.

Public works statutes contemplate written contracts executed by the parties. See NMSA 1978, § 13-4-13 (1965 as amended through 1991) (requiring that "every contract" within the scope of the Public Works Minimum Wage Act must contain a provision relating to failure to pay the prevailing wage rates); NMSA 1978, § 13-4-11 (1965 as amended through 2005)[7] (every public works contract shall contain a provision stating the minimum wages to be paid); NMSA 1978, § 13-4-18 (1987) (when a construction contract is awarded in excess of $25,000, specified performance and payment bonds must be delivered to the state agency or local public body and become binding upon execution of the contract).

Thus, normally, the date that written contracts are last fully executed would probably control for purposes of applying Chapter 99. According to the language of Chapter 99, if "the subcontractor's contract" is executed on or after that effective date of Chapter 99, that subcontractor "shall provide a performance and payment bond." Thus, Chapter 99 would apply to the subcontractor contracts in the circumstances described in Paragraphs 1, 2, 3, and 4 above, but not 5.

[7] House Bill 442, now 2005 N.M. Laws, ch. 253, amends the Public Works Minimum Wage Act.