

November 1, 2000

OPINION

OF Opinion No. 00-04

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Attorney General

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TO: The Honorable Pauline B. Eisenstadt

State Senator

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QUESTION:

Does a contract giving the Pepsi-Cola Company ("Pepsi") the exclusive right to sell its beverage products on the premises of the City of Rio Rancho raise any constitutional issues, including the prohibition against exclusive franchises and privileges set forth in Article IV, Section 26 of the New Mexico Constitution?

CONCLUSION:

The contract probably is permissible under Article IV, Section 26. However, a provision of the contract under which the City of Rio Rancho agrees to indemnify Pepsi against certain liabilities likely is unconstitutional and unenforceable under the municipal debt restrictions of Article IX, Section 12 of the state constitution.

FACTS:

Pepsi and the City of Rio Rancho have entered into a Beverage Contract that gives Pepsi the exclusive right to sell its beverage products on City premises, including athletic facilities and concession stands and the grounds, parking lots and vending areas of City buildings. We understand that the Contract was awarded after competitive bidding pursuant to the Procurement Code (NMSA 1978, §§ 13-1-28 to -199). The Contract has a term of eight years. See Beverage Contract, § 2. At the end of the term, the parties may agree to extend the Contract by mutual agreement. Id.[3] In exchange for the exclusive right to sell its beverage products on City premises, Pepsi has agreed to pay the City an annual exclusive rights fee, specified commissions and at least \$3,000.00 worth of free product annually. Id. § 5.

ANALYSIS:

Exclusive Right to Sell Soft Drinks

Because it purports to grant Pepsi the exclusive right to sell its beverage products on City premises and in City facilities, the Beverage Contract raises an issue under Article IV, Section 26 of the New Mexico Constitution. That provision, in pertinent part, states that “no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state.” See also N.M. Const. art. IV, § 24 (prohibiting the legislature from passing “local or special laws ... granting to any corporation, association or individual ... any special or exclusive privilege, immunity or franchise...”).

Article IV, Section 26 and similar provisions in other states’ constitutions are intended to ensure that any rights, franchises or privileges granted by the state or a municipality are equally available to all similarly situated persons. See *State ex rel. Interstate Stream Comm’n v. Reynolds*, 71 N.M. 389, 395, 378 P.2d 622 (1963); N.M. Att’y Gen. Op. No. 70-53 (1970) (Art. IV, § 26 is intended to “prevent unequal and partial legislation or action on the part of government, favoring certain groups or individuals”). See also *State v. Lynch*, 796 P.2d 1150, 1159 (Okla. 1990) (prohibition in Oklahoma Constitution against exclusive rights, privileges and immunities was enacted to preserve equality between citizens who are similarly situated). The safeguards provided by constitutional provisions prohibiting special or exclusive rights and privileges are similar to those accorded under equal protection principles. See, e.g., *Department of Mental Hygiene v. Kirchner*, 400 P.2d 321, 322 (Cal. 1965) (Fourteenth Amendment to the federal constitution and state constitutional prohibition against special privileges and immunities “provide generally equivalent but independent protections...”). See generally 16B Am.Jur.2d Constitutional Law § 870 (1998).

New Mexico case law interpreting Article IV, Section 26 is not directly on point. The most analogous case is *Gomez v. City of Las Vegas*, 61 N.M. 27, 293 P.2d 984 (1956), in which the New Mexico Supreme Court upheld an exclusive contract awarded by a municipality for garbage collection and disposal. The Court’s ruling was based on the premise that the removal of garbage was a proper exercise of the municipality’s police power. 61 N.M. at 988. As such, the means for accomplishing the removal of garbage were within the municipality’s discretion, as long as they were reasonable, and were not subject to the strictures of Article IV, Section 26. *Id.* Because the provision of soft drinks does not involve the exercise of a municipality’s police power, the analysis used in *Gomez* does not apply to the Beverage Contract. Cf. *Franklin Fire Ins. Co. v. Montoya*, 32 N.M. 88, 251 P. 390 (1926) (holding that a statute prohibiting an insurance company from having more than one agent in each town violated Article IV, Section 26 and could not be justified as a valid exercise of the state’s police power).

Legal authority on this issue from other jurisdictions is also scarce. Nevertheless, it appears that state constitutional prohibitions against special privileges generally do not encompass grants by the state or municipalities made available on an equal basis to all similarly situated persons or entities. For example, the Arizona Supreme Court examined the award of a certificate of convenience and necessity to one of two common carrier applicants. *Haddad v. State*, 201 P. 847 (Ariz. 1921). In upholding the grant in the face of a challenge under Arizona’s constitutional prohibition against special privileges and immunities, the Court first noted that the Arizona Constitution, like New Mexico’s, also prohibited “special laws” granting exclusive privileges (see N.M. Const. art. IV, § 24, quoted above). This provision, according to the Court, suggested “an implied recognition of the legislative power to make such grants under general laws.” *Id.* at 852. Reading the two constitutional provisions together, the Court went on to explain:

Having in mind that the object of all such provisions is to secure equality of opportunity and right to all persons similarly situated, our investigation of the authorities leads us to the conclusion that we cannot disregard the implied recognition by the Constitution of the power of the lawmaking body, acting upon its own conception of wisdom and policy, to enact general laws which permit of the grant of franchises, privileges, and immunities, exclusive in character, when the public interest in the judgment of the Legislature is thereby subserved, if under the terms of such laws all citizens or classes of citizens are afforded equal opportunity and right to receive such grants by

original investment. We think that a law which provides a scheme for the grant of such privileges, which is fair and equal in its terms, should be upheld....

Id. at 852.

Similar principles have been applied in judicial and other legal opinions upholding government contracts for the exclusive right to provide goods or services. See, e.g., *Franklin Solid Waste Servs., Inc. v. Jones*, 354 So.2d 4 (Ala. 1977) (five-year contract awarded by county upon the low bid for exclusive solid waste collection services was not an exclusive or special privilege banned by the state constitution); *Childers v. West Pub. Co.*, 156 P.2d 809 (Okl. 1945) (statute directing a named private publisher to compile, codify and annotate Oklahoma Statutes 1941 under a contract with the state did not grant an unconstitutional special privilege where there was no provision making the edition prepared by the private publisher the only publication cognizable by the courts); Okl. Att'y Gen. Op. No. 98-20 (1998) (a contract granting a soft drink company a multi-year exclusive right to sell soft drinks at all state university facilities does not constitute a grant of an exclusive right or privilege with the meaning of state constitution's prohibition against exclusive rights, privileges or immunities).

In addition, it has been noted that a local government, as long as it acts reasonably, retains considerable discretion to contract as it deems appropriate for the provision of goods and services on its own property. See *Southwestern Broadcasting Co. v. Oil Center Broadcasting Co.*, 210 S.W.2d 230 (Tex. Civ. App. 1947) (upholding a contract by an independent public school district granting exclusive rights to broadcast fieldside play by play accounts of football games on premises owned and controlled by the district); N.M. Att'y Gen. Op. No. 70-53 (1970) (concluding that a municipality was empowered to enter into an exclusive contract with a car rental agency at the municipal airport).[4]

In this case, the concerns addressed by Article IV, Section 26 are not present. The City of Rio Rancho did not arbitrarily confer the Beverage Contract on Pepsi by fiat or because of favoritism to Pepsi. Instead, the Contract was awarded to Pepsi after similarly situated companies were given the opportunity to submit bids under the Procurement Code. In addition, the exclusive right to sell soft drinks under the Beverage Contract is limited to the City's property and facilities. Under these circumstances, based on the legal authorities discussed above, we believe that the Contract would pass constitutional muster under Article IV, Section 26.

Indemnification Clause

The Beverage Contract includes a provision under which the City of Rio Rancho agrees to:

indemnify and hold Contractor, its subsidiaries, affiliates or assigns harmless from and against any and all suits, actions, claims, demands, losses, costs, damages, liabilities, fines, expenses, and penalties (including reasonable attorney's fees) arising out of: (i) its breach of any term or condition of this Agreement; and/or (ii) the negligence or willful misconduct of the City of Rio Rancho.

§ 22(B). This clause implicates the state constitution's restrictions on municipal indebtedness. In particular, a municipality is prohibited from contracting "any debt" unless it adopts an ordinance stating the purpose of the debt, provides for the levy of a property tax sufficient to pay the debt and submits the question of incurring the debt to qualified voters in the municipality. N.M. Const. art. IX, § 12.

Article IX, Section 12 and the similar constitutional debt restrictions for the state and other local governments (N.M. Const. art. IX, §§ 8, 11-13) have been judicially interpreted to preclude a government from entering into an agreement subjecting it to contingent liability, the amount of

which is uncertain at the time of the agreement. See *Henning v. Town of Hot Springs*, 44 N.M. 321, 102 P.2d 25 (1940); *City of Santa Fe v. First Nat. Bank in Raton*, 41 N.M. 130, 65 P.2d 857 (1937). In addition, absent compliance with the constitution's debt provisions, a municipality generally is prohibited from obligating itself to pay out of general revenues beyond the current fiscal year. See *Montaño v. Gabaldon*, 108 N.M. 94, 766 P.2d 1328 (1989); *Hamilton Test Sys., Inc. v. City of Albuquerque*, 103 N.M. 226, 704 P.2d 1102 (1985).

On its face, the indemnification provision in the Beverage Contract quoted above requires the City of Rio Rancho to agree to a contingent liability of an unlimited amount that may arise in future fiscal years. This constitutes a "debt" for purposes of Article IX, Section 12 that is barred absent compliance with the restrictions imposed by the state constitution.

The Contract's indemnification clause also implicates the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -27. That Act generally grants "governmental entities," including political subdivisions like Rio Rancho, and their officers and employees immunity from liability for any tort, except as waived by the Act. § 41-4-4(A). Further, the legislature has declared that it is the public policy of the state that governmental entities and public employees shall only be liable within the limitations of the Act. § 41-4-2. The Tort Claims Act is the "exclusive remedy" against a governmental entity or public employee for any tort for which immunity has been waived under the Act. § 41-4-17.

The Tort Claims Act limits the potential tort liability of municipalities to that expressly waived by the Act. A municipality has no authority to waive its sovereign immunity, assume tort liability for third parties, or otherwise expand its potential liability beyond what the legislature has permitted. Thus, in addition to violating the debt restrictions of Article IX, Section 12 of the state constitution, the indemnification clause contained in the Beverage Contract is impermissible to the extent it requires the City to assume liability outside that allowed under the Tort Claims Act.

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[1] As indicated in the text of this opinion, the Beverage Contract reportedly was awarded pursuant to the Procurement Code. Section 13-1-150 of the Code limits contracts in excess of \$25,000 to a term of eight years, "including all extensions and renewals." This provision may preclude the parties from simply agreeing to extend the Beverage Contract at the end of its initial eight-year term.

[2] New Mexico Attorney General Opinion No. 70-53 (1970) concluded that a municipality's exclusive contract granting a rental car agency the concession for providing rental cars at the airport likely would survive a challenge under Article IV, Section 26. That conclusion was based on a line of cases from other states that, according to the opinion, would enable a New Mexico court to "uphold these concessions on the theory that the airport is a proprietary function and that the exclusive concession is a managerial prerogative, reasonably incident to the conduct of an efficient airport operation." Since the 1970 opinion was issued, the legal significance of the

governmental-proprietary distinction for purposes of analyzing local governmental action has been disavowed by the New Mexico Supreme Court. See *Morningstar Water Users Ass'n v. Farmington Municipal Sch. Dist.*, 120 N.M. 307, 317, 901 P.2d 725 (1995) (“We ... believe that the differentiation between the governmental and proprietary roles of a municipality is of no decisive legal value. Any determination by New Mexico courts concerning the roles or liabilities or duties of a municipality – or any other government entity – can henceforth be based upon other less equivocal grounds”). Thus, although the 1970 opinion supports the legality of a contract for the exclusive provision of services on municipal property, we have not employed the governmental-proprietary distinction in analyzing the Beverage Contract between Pepsi and Rio Rancho.